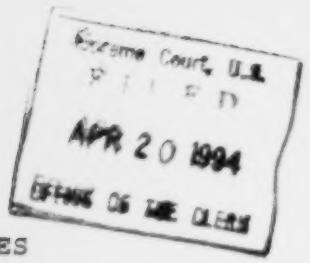

No. 93-1495

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

SAMUEL A. LEWIS, Director, Arizona Department of Corrections, and GRANT WOODS, Attorney General for the State of Arizona,

Petitioners,

v.

MITCHELL THOMAS BLAZAK,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO CERTIORARI

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Counsel of Record for Respondent

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QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to review a question which Petitioners did not raise in the Court of Appeals, which the Court of Appeals' decision did not address, and which already has been resolved by a prior decision of this Court.

2. Whether this Court should grant certiorari to review a decision that turns solely on the application of a well established due process rule to a specific and highly detailed set of undisputed facts.

3. Whether the Court of Appeals erred when, applying well established due process standards to undisputed facts of record, it concluded (a) that the evidence before the state trial court raised a bona fide doubt as to Respondent/Defendant's competence to stand trial, and (b) that the state trial court therefore was required to hold a hearing on Respondent's competence under Pate v. Robinson, 383 U.S. 375 (1966).

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STATEMENT OF THE CASE

A. Procedural History.

In November 1974, Respondent Mitchell Blazak was convicted in the Superior Court of Arizona of two counts of first-degree murder, one count of assault with intent to commit murder, and one count of attempted armed robbery. Mr. Blazak was sentenced to death on each of the two murder convictions. The convictions and sentences were affirmed on direct appeal. State v. Blazak, 560 P.2d 54, 55 (Ariz. 1977).[1]

Mr. Blazak filed a petition for post-conviction relief in the state trial court in March 1977. This petition was denied in February 1979, and the Arizona Supreme Court denied review in November 1979.

Mr. Blazak subsequently filed an initial petition for a writ of habeas corpus in the District Court. In December 1984, the District Court stayed its proceedings to permit Mr. Blazak to proceed further in the state courts. In March 1985, Mr. Blazak filed a second petition for post-conviction relief in the state trial court, which denied relief in July 1985. The Arizona Supreme Court denied review in February 1986.

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[1] In December 1979, the Arizona Supreme Court ordered that Mr. Blazak be resentenced on the murder convictions. Mr. Blazak was resentenced to death, and those sentences were affirmed on appeal. State v. Blazak, 643 P.2d 694 (Ariz. 1982). Because none of the rulings of the courts below in this habeas corpus proceeding concerned the validity of Mr. Blazak's sentences, the Statement of the Case need not treat those aspects of the procedural history in detail.

Mr. Blazak then filed a Second Amended Petition for Writ of Habeas Corpus in the pending District Court proceedings. This petition included eleven claims relating to the validity of Mr. Blazak's convictions. Following motions for summary judgment and an evidentiary hearing, the District Court entered a Judgment granting relief on one of Mr. Blazak's claims, but denying relief with regard to the remaining claims regarding Mr. Blazak's convictions. (Pet. App. B).[2]

The basis on which the District Court granted relief was that evidence before the state trial court in 1974 raised reasonable grounds to doubt Mr. Blazak's competency to stand trial, and that the state trial court's failure to hold a hearing on Mr. Blazak's competency therefore violated due process under Drope v. Missouri, 420 U.S. 162 (1975), Pate v. Robinson, 383 U.S. 375 (1966), and Dusky v. United States, 362 U.S. 402 (1960). (Pet. App. B at 4-6).

Both Petitioners and Respondent appealed the judgment of the District Court. The Court of Appeals initially considered sua sponte whether it had jurisdiction in light of the District Court's failure to address Mr. Blazak's claims regarding his sentences. By a two-to-one vote, the Court of Appeals held that the District Court had entered a final judgment that was appropriate for appellate review. Blazak v. Ricketts, 971 F.2d

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[2] The Second Amended Petition also included several claims relating to the validity of Mr. Blazak's death sentences. However, these claims were mooted by the District Court's Judgment, and consequently they are not at issue in these proceedings. 1 F.3d at 893, Pet. App. C at 7.

1408, 1409, 1412 (9th Cir. 1992).[3]

On the merits, the Court of Appeals -- by an evenly divided vote -- affirmed the District Court with respect to the claim on which the District Court had granted relief. Judge Tang held that the District Court was correct in concluding that the evidence before the state trial court raised a "bona fide doubt" about Mr. Blazak's competency to stand trial, and that the state trial court's failure to hold a hearing on competency therefore violated due process, Blazak v. Ricketts, 1 F.3d 891, 893-900 (9th Cir. 1993); Judge Brunetti dissented on the merits, id. at 901-903; and Judge Beezer declined to express any view on the merits in light of his previously stated position that the Court of Appeals lacked jurisdiction, id. at 900. Although several other challenges to Mr. Blazak's convictions had been briefed and argued in the Court of Appeals, id. at 892, none of the panel members expressed any opinion on the merits of those challenges.

Petitioners then filed a petition for rehearing, with a suggestion for rehearing en banc. Rehearing was denied by the panel, and no other judge of the Court of Appeals requested a vote on the suggestion for rehearing en banc. (Pet. App. E).[4]

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[3] In the Court of Appeals, Petitioners and Respondent agreed that that court had jurisdiction, and the Petition does not raise this issue. In any event, the decision of the panel majority on the jurisdictional issue plainly was correct. See 971 F.2d at 1408-1412.

[4] Judge Brunetti did vote to grant rehearing en banc. (Pet. App. E at 1). Judge Beezer declined to vote on the petition for rehearing, but voted to grant rehearing en banc on the jurisdictional issue (id. at 1-2) -- although this issue was not raised by the petition for rehearing or the suggestion for

B. Facts Relating to the Crimes With Which Respondent Was Charged.

All of the issues properly presented by the Petition for a Writ of Certiorari concern Respondent Blazak's competency to stand trial in 1974. The facts relating to the crimes of which Mr. Blazak was convicted therefore are irrelevant to the pending Petition. However, because the Petition discusses those facts in a manner that misleadingly suggests that Mr. Blazak's guilt is clear (Pet. at 4), the following paragraphs briefly will address the issue of Mr. Blazak's guilt or innocence.

There is no dispute in this case that a gunman wearing a ski mask entered the Brown Fox Tavern in Tucson, Arizona, on the evening of December 14, 1973, demanded money from the bartender, and then shot three people, killing two. However, whether the masked gunman was Mitchell Blazak is very much in dispute. Thus, Mr. Blazak argued in the Court of Appeals that the State's evidence was insufficient to permit a rational jury to find that Mr. Blazak was guilty beyond a reasonable doubt. (See App. L, infra, at 9-39). Moreover, Mr. Blazak argued that the State obtained the convictions in violation of the Due Process Clause by presenting "scientific" evidence -- relating to hair samples recovered from a discarded ski mask -- which purported to connect Mr. Blazak with the crime, but which in fact was false evidence with no probative value. (See App. L, infra, at 42-47). Mr. Blazak also argued that exculpatory evidence that was uncovered

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rehearing en banc. (Pet. App. D).

after his convictions required a new trial as a matter of fundamental fairness. (See App. L, infra, at 47-62).[5]

C. Facts Relating to the Questions Presented.

Circuit Judge Tang's opinion below sets out accurately and in some detail the facts that are relevant to the issue that was decided by the Court of Appeals. 1 F.3d at 892-99, Pet. App. C at 11-20, 27-29.[6] The following paragraphs therefore will simply outline the most important of those facts.

1. The record shows that the following evidence relating to Mr. Blazak's competency to stand trial was before the state trial court in 1974:[7]

a. In 1967, Mr. Blazak was the subject of three competency hearings in connection with criminal charges then pending in the state trial court. The judge who presided over these competency hearings, the Hon. Richard Roylston, was the same judge who later presided over the proceedings in the case that is the subject of this case. 1 F.3d at 894-95, Pet. App. C at 11-12, 15.

b. In connection with each of the 1967 competency

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[5] The Court of Appeals did not address these arguments, or several others, as they were mooted by that court's judgment.

[6] Judge Brunetti's dissent does not dispute Judge Tang's review of the facts. 1 F.3d at 900-903, Pet. App. C at 33-43.

[7] Some of the evidence discussed below related to a previous criminal case involving Mr. Blazak. That evidence was before the state trial court in the proceedings in the instant case through a 1974 Presentence Report and attachments thereto. 1 F.3d at 895-97, Pet. App. C at 15-20.

hearings, Mr. Blazak was examined by a number of doctors, including Dr. Willard Shankel (a psychiatrist) and Dr. Harrison Baker (a psychologist). Dr. Shankel consistently concluded that Mr. Blazak was psychotic and suffered from "schizophrenic reaction, paranoid type," and that he was unable to fully understand the charges against him or to cooperate in his defense. Dr. Baker, however, diagnosed Mr. Blazak as a "sociopathic personality," and he consistently concluded that Mr. Blazak was competent to stand trial. 1 F.3d at 895, Pet. App. C at 13.[8]

c. At each of the three 1967 competency hearings, the state trial court found that Mr. Blazak was not competent to stand trial, apparently crediting Dr. Shankel's diagnosis over Dr. Baker's. 1 F.3d at 894, Pet. App. C at 11-12.

d. In April of 1968, Mr. Blazak waived any further competency hearings, pled guilty, and proceeded to trial on an insanity defense. He was convicted, but the Arizona Supreme Court reversed, in part on the ground that Mr. Blazak's waiver of further competency hearings should not have been accepted. 1 F.3d at 895, Pet. App. C at 13-14.

e. In March of 1970, on remand from the Arizona Supreme Court, Judge Richard Roylston held a fourth competency hearing. Dr. Baker again opined that Mr. Blazak was competent to

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[8] In connection with the 1967 proceedings, two colleagues of Dr. Baker, Dr. Pierce and Dr. Willis, also concluded that Mr. Blazak was competent to stand trial. 1 F.3d at 895, Pet. App. C at 13.

stand trial. Dr. Shankel still held the opinion that Mr. Blazak was a paranoid schizophrenic, and he stated that eight other psychiatrists who had examined Mr. Blazak agreed with that diagnosis. However, Dr. Shankel believed that Mr. Blazak's schizophrenia was then in remission, and that Mr. Blazak therefore was competent to stand trial. A third expert, Dr. Bennett, testified that Mr. Blazak's paranoid illness would make it "difficult for him, if not impossible, to understand the advice and cooperate with . . . his attorney." 1 F.3d at 895, Pet. App. C at 14.

f. At the March 1970 hearing, Judge Richard Roylston ruled that Mr. Blazak was competent to stand trial. 1 F.3d at 895, Pet. App. C at 14. Given Judge Roylston's earlier rulings, his 1970 ruling must have been based primarily on Dr. Shankel's opinion that Mr. Blazak's paranoid schizophrenia was then in remission.

g. A December 8, 1971 presentence report included a notation that a Dr. Russell had said that "based on all the previous psychiatric reports the defendant is a psychopath." 1 F.3d at 896, Pet. App. C at 18.

h. A December 15, 1974 Presentence Report contained synopses of the 1967-1968 mental evaluations that included opinions that "[t]here is no question . . . as to this man's mental illness" and that Mr. Blazak was suffering from "L.S.D.

psychosis." 1 F.3d at 895-96, Pet. App. C at 15-17.[7]

i. At a September 10, 1974 pretrial hearing in the instant case, when the trial judge attempted to enforce an order that Mr. Blazak provide handwriting exemplars, Mr. Blazak orally responded in a disjointed and nonsensical manner that the judge himself stated did not make sense. Id. at 899, Pet. App. C at 27-28.

j. At a September 25, 1974 pretrial hearing, Mr. Blazak, in a long and rambling statement, made various bizarre allegations -- about misconduct by law enforcement officers and his own attorney -- that were consistent with paranoid thinking. 1 F.3d at 899, Pet. App. C at 28-29.

2. Incredibly, Mr. Blazak's trial counsel, Howard Kashman, was not aware of Mr. Blazak's history of mental illness, and he did not request a competency hearing. In the habeas corpus proceedings in the District Court, Mr. Kashman testified that he would have moved for a competency hearing if he had known about that history. 1 F.3d at 899, n. 12, Pet. App. C at 30.

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[7] This Presentence Report also included references to and materials from the earlier competency proceedings. 1 F.3d at 894-96, Pet. App. C at 15-20.

SUMMARY OF THE ARGUMENT

A. The petitioners' primary argument -- that the Court of Appeals applied the wrong standard of review -- is not an appropriate basis for granting certiorari, for three reasons:

1. The petitioners did not even hint at this argument in the Court of Appeals. Indeed, the petitioners specifically argued that the Court of Appeals should apply the standard of review which that court did apply in reaching its decision of August 2, 1993.

2. The petitioner's new argument -- that the Court of Appeals should have required Respondent Blazak to demonstrate by "clear and convincing evidence" that there was a "real, substantial and legitimate doubt as to [his] mental capacity" -- is premised on the incorrect assumption that this case involves a "claim of incompetence by a state prisoner." (Pet. at 6-7). In fact, the question that the Court of Appeals decided was whether the state trial court was required to hold a hearing on Mr. Blazak's competency to stand trial. 1 F.3d at 893-900. As the Court of Appeals recognized, id. at 893, such a hearing is required whenever evidence before the trial court raises a reasonable, or "bona fide," doubt as to the defendant's competency. Pate v. Robinson, 383 U.S. 375, 384, 385 (1966).

3. The petitioners' argument that a heightened standard of review of a Pate claim is required on federal habeas corpus review (as opposed to direct review) is flatly

contradicted by this Court's decision in Pate itself -- which was a habeas corpus case in which this Court applied the "reasonable doubt as to competency" standard in reversing the defendant's state-court conviction.

B. As the opinions in the Court of Appeals demonstrate, 1 F.3d at 892-903, the resolution of the issue decided below turns solely on the application of a well established due process rule -- recently reaffirmed by this Court -- to a specific and highly detailed set of undisputed facts. Consequently, this case presents no important question of law of the sort that is appropriate for review on certiorari.

C. The record in this case shows that there was evidence before the state trial court that raised a substantial, bona fide doubt as to Respondent Blazak's competency to stand trial. The decision of the Court of Appeals -- that the state trial court erred in failing to hold a hearing on Mr. Blazak's competence -- therefore was correct under Pate v. Robinson, supra.

ARGUMENT

I. THE PETITIONERS' PRIMARY ARGUMENT FOR GRANTING CERTIORARI -- THAT THE COURT OF APPEALS APPLIED THE WRONG STANDARD OF REVIEW -- WAS NOT PRESENTED TO OR ADDRESSED BY THE COURT OF APPEALS, AND IS DIRECTLY CONTRARY TO A PRIOR DECISION OF THIS COURT

A. The weakness of the petitioners' position in this case is demonstrated by the fact that what they characterize as the "primary" issue (Pet. at 7) is one which was not raised in the Court of Appeals; which mischaracterizes the issue that was decided by the Court of Appeals; and which has been settled -- against the position asserted by the petitioners -- by prior decisions of this Court.

B. The petitioners' primary argument is that the Court of Appeals applied the wrong "standard of review" in holding that the state trial court violated Mr. Blazak's due process rights when it failed to hold a hearing on Mr. Blazak's competency to stand trial. (Pet. at 6-10). The Court of Appeals -- relying on this Court's decisions in Pate v. Robinson, 383 U.S. 375 (1966), and Medina v. California, ___ U.S. ___, 112 S.Ct. 2572, 2574, 2581 (1992) -- held that Mr. Blazak was entitled to relief if there was sufficient evidence before the state trial court to create a "bona fide" doubt about Mr. Blazak's competency to stand trial. Blazak v. Ricketts, 1 F.3d 891, 892-93, 897-900 (9th Cir. 1993), Pet. App. C at 5-6, 20-31. The petitioners now argue that the standard applied by the Court Appeals was proper only for direct review, and that under the correct standard for "federal

habeas corpus review of a claim of incompetence by a state prisoner," the prisoner must prove, "by clear and convincing evidence, that the facts are 'sufficient to positively, unequivocally and clearly generate a real, substantial and legitimate doubt as to the mental capacity of the petitioner . . . .'" (Pet. at 6-7; emphasis added).

C. The petitioners' primary argument is wholly without merit, for several reasons:

1. The petitioners did not hint at this argument in the Court of Appeals, and they failed to mention in that court either of the cases -- Barefoot v. Estelle, 463 U.S. 880 (1985), and Bruce v. Estelle, 483 F.2d 1031 (5th Cir. 1973) -- on which they now rely (Pet. at 6-7), even in their Petition for Rehearing and Suggestion for Rehearing En Banc. (Pet. App. D). In fact, in the Court of Appeals the petitioners themselves asserted that the ultimate question was whether the evidence that was before the state trial court in 1974 created a bona fide doubt as to Mr. Blazak's competency to stand trial. (See App. M, infra, at 10-11; Pet. App. D at 10-11, 16). This Court ordinarily will not decide a question that was not presented to or decided by the courts below, see, e.g., United States v. Lovasco, 431 U.S. 783, 788, n. 7 (1977), United States v. Ortiz, 422 U.S. 891, 898 (1975), Duignan v. United States, 274 U.S. 195, 200 (1927) -- and there is no reason why it should do so in this case.

2. The petitioners' primary argument effectively mischaracterizes the claim for habeas corpus relief that was

decided by the Court of Appeals in Mr. Blazak's favor. That claim -- which was based on Pate v. Robinson, supra, Drope v. Missouri, 420 U.S. 162 (1975), and Dusky v. United States, 362 U.S. 402 (1960) -- was that the state trial court violated due process when it failed to hold a hearing on Mr. Blazak's competency to stand trial, despite evidence before the trial court that raised a bona fide doubt as to Mr. Blazak's competency. Blazak v. Ricketts, supra, 1 F.3d at 892-900, Pet. App. C at 5-31. The claim on which the Court of Appeals granted relief was not, as the Petition suggests, "a claim of incompetence" (Pet. at 7).[10]

3. The preceding paragraph reflects an important distinction that is well recognized by the federal courts, but which the Petition obfuscates. When a federal habeas corpus petitioner claims that he was actually incompetent to stand trial, he unquestionably bears the burden of proving -- with whatever evidence currently is at his disposal, but by a preponderance of that evidence -- that he was incompetent at the time of his trial. See, e.g., Boag v. Raines, 769 F.2d 1341, 1343 (9th Cir. 1985); Zapata v. Estelle, 588 F.2d 1017, 1021-22 (5th Cir. 1979); Stone v. United States, 358 F.2d 503, 504-506 (9th Cir. 1966). However, when a habeas petitioner's claim is that the state trial court violated due process by failing to

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[10] The Court of Appeals noted that the District Court had not found that Mr. Blazak actually was incompetent to stand trial in 1974. 1 F.3d at 894, n. 3, Pet. App. C at 11; see also Pet. App. B at 5.

hold a hearing on his competency to stand trial, the petitioner instead must show that the evidence that was before the trial court created a reasonable, or "bona fide," doubt as to his competency to stand trial. Medina v. California, ___ U.S. ___, 112 S.Ct. 2572, 2579 (1992); Drope v. Missouri, 420 U.S. 162, 181 (1975); Pate v. Robinson, 383 U.S. 375, 384, 385 (1966); Zapata v. Estelle, supra, 588 F.2d at 1020; Moore v. United States, 464 F.2d 663, 666 (9th Cir. 1972).

4. The petitioners' argument that the "bona fide doubt" standard is appropriate only on direct review, and that a stricter standard applies in a federal habeas corpus proceeding, is not supported at all by the cases on which the petitioners rely -- and it is directly contrary to a decision by this Court that the petitioners conveniently ignore, even though that decision was the primary authority for the Court of Appeals' judgment:

a. While Barefoot v. Estelle, 463 U.S. 880, 887 (1985) (cited in the Petition at 6-7), contains some general language about the presumption of finality and legality that attaches to a state court conviction, that decision has nothing to do with the questions presented by the instant case.[11] And Bruce v. Estelle, 483 F.2d 1031 (5th Cir. 1973) (cited in the Petition at

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[11] The issues in Barefoot concerned (1) the procedures that a court of appeals should follow in deciding whether to stay a scheduled execution in a federal habeas corpus case in which the district court has denied relief but granted a certificate of probable cause, and (2) the admissibility at a capital sentencing hearing of psychiatric testimony regarding the defendant's future dangerousness. 463 U.S. at 887, 896.

7), was a case in which the petitioner claimed that he was actually incompetent to stand trial -- not that the state trial court erroneously failed to hold a hearing on the petitioner's competency to stand trial notwithstanding evidence then before it that created a bona fide doubt as to the petitioner's competency. Id. at 1033-34.

b. Any notion that the "standard of review" for a claim such as the one in this case -- i.e., that a state trial court unconstitutionally failed to hold a hearing on the defendant's competency to stand trial -- is different in a federal habeas corpus proceeding than on direct review is flatly contradicted by this Court's decision in Pate v. Robinson, supra. In Pate -- which was a habeas corpus case -- this Court held that a defendant whose competence is in doubt cannot be deemed to have waived his right to a competency hearing. 383 U.S. at 384. Because the evidence before the state trial court in Pate raised a reasonable doubt as to the defendant's competency, this Court held that the trial court's failure to hold a hearing on competency violated due process. Id. at 385. No subsequent decision by this Court (or any federal circuit court) has raised any doubt about the validity of the holding in Pate; indeed, this Court recently reaffirmed that holding in Medina v. California, ___ U.S. ___, 112 S.Ct. 2572, 2579 (1992).

D. In short, the primary question presented by the Petition is simply a non-issue.

II. CERTIORARI IS NOT APPROPRIATE BECAUSE THE DECISION OF THE COURT OF APPEALS TURNS SOLELY ON THE APPLICATION OF A WELL ESTABLISHED DUE PROCESS RULE TO A SPECIFIC AND DETAILED SET OF UNDISPUTED HISTORICAL FACTS

A. In this case, all of the judges who have ruled on the merits of the claim that was the subject of the Court of Appeals' decision have agreed that it is governed by the following due process rule: In a criminal case, the trial court must hold a hearing on the defendant's competency to stand trial whenever there is evidence before the court that raises a "reasonable," or "bona fide," doubt as to the defendant's competency, even if the defendant does not request such a hearing. This rule has been firmly established at least since this Court's decision in Pate v. Robinson, 383 U.S. 375, 384, 385 (1966). See also Medina v. California, ___ U.S. ___, 112 S.Ct. 2572, 2574, 2581 (1992); Drope v. Missouri, 420 U.S. 162, 183 (1975).

B. As the opinions below by Judge Tang and Judge Brunetti illustrate, the resolution of Mr. Blazak's "Pate" claim turns solely on the application of the above-described rule of law to a highly specific and detailed set of historical facts. Thus, this case presents no significant question of law; and the Court of Appeals' evenly divided decision cannot have any significant precedential effect on future cases.

C. Consequently, the judgment of the Court of Appeals does not conflict with any decision by another United States court of appeals or a state court of last resort; has not "so departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision";

has not decided any "important question of federal law which has not been . . . settled by this Court"; and has not decided any federal question "in a way that conflicts with applicable decisions of this Court." This case therefore meets none of the criteria for review on certiorari suggested by Rule 10.1 of the Rules of this Court.[12]

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[12] This conclusion is not affected by the somewhat unusual nature of the Court of Appeals panel's three-way vote. As Judge Beezer's dissenting opinion demonstrates, it is proper for a judge to abstain from voting on the merits when he believes the court lacks jurisdiction, 1 F.3d at 900, Pet. App. C at 32-33; and affirmance by an evenly divided vote is a proper appellate disposition. United States v. Zolin, 491 U.S. 554, 561 (1989).

III. CERTIORARI IS NOT APPROPRIATE BECAUSE THE DECISION OF THE COURT OF APPEALS WAS CORRECT ON THE MERITS

The points made in the preceding divisions of this Brief in Opposition are sufficient to require denial of certiorari. In addition, there is a third, independently sufficient reason why further review on certiorari is unnecessary and inappropriate: The result of the Court of Appeals' decision is correct on the merits.

A. As this Brief in Opposition already has attempted to make clear, the issue that the Court of Appeals properly decided was not whether Mr. Blazak was (by a preponderance of the evidence) incompetent to stand trial in 1974. Rather, the question was whether the information before the state trial court in 1974 raised a "bona fide" doubt as to Mr. Blazak's competency. See 1 F.3d at 893 & n. 1, Pet. App. C at 8; Pate v. Robinson, supra, 383 U.S. at 378, 385. The record in this case shows that the answer to that question is "yes":

1. A June 1967 report by Dr. Willard Shankel (a psychiatrist) concluded that Mr. Blazak was psychotic and suffered from "schizophrenic reaction, paranoid type," and that he was unable to fully understand the charges against him or to cooperate in his defense. 1 F.3d at 896-97, Pet. App. C at 19-20; Pet. App. I at 6. In their Petition for Rehearing in the Court of Appeals, the petitioners correctly conceded that "[s]tanding alone, Dr. Shankel's June 2, 1967, report gave rise to a substantial doubt about Petitioner's ability to proceed to

trial." (Pet. App. D at 13).

2. Obviously, even more doubt as to Mr. Blazak's competency to stand trial was created by the additional, consistent opinions by Dr. Shankel and Dr. Bennett -- and the eight other psychiatrists to whom Dr. Shankel referred in his March 1970 report -- that Mr. Blazak suffered from paranoid schizophrenia and was not competent to stand trial at various times during 1967; by the three findings by the state trial court that Mr. Blazak was incompetent; by Dr. Bennett's 1970 opinion that Mr. Blazak was not competent to stand trial; and by Mr. Blazak's bizarre behavior during the 1974 pretrial proceedings. 1 F.3d at 894-95, 898-99, Pet. App. C at 11-14, 27-29; Statement of the Case, supra at 5-8.

3. Of course, there was also some countervailing evidence before the state trial court: the reports by Drs. Baker, Pierce, and Willis, and the 1970 finding of competency. (See Statement of the Case, supra at 5-7). In the absence of any further inquiry by the state trial court, that evidence might have justified a finding, by a preponderance of the evidence, that Mr. Blazak was competent to stand trial in 1974. However, it plainly did not remove the substantial doubt that was created by the evidence of Mr. Blazak's incompetence discussed above. This is especially so in light of the fact that the state trial court's finding that Mr. Blazak was competent to stand trial in 1970 -- after three previous findings of incompetency -- must have been based on Dr. Shankel's opinion that Mr. Blazak's serious mental

illness then was in remission.[13] (See Statement of the Case, Sections (C)(1)(a)-(f), supra at 5-7). It is precisely for that reason that the state trial court was required, as a matter of due process, to make a further inquiry into Mr. Blazak's competence in 1974.

B. The preceding conclusion is compelled by the decision in Pate v. Robinson, 383 U.S. 375 (1966), in which this Court held that the state trial court's failure to hold a hearing on the defendant's competency to stand trial violated due process, even though the evidence before that court raised substantially less doubt about the defendant's competency than the evidence before the state trial court in this case:

1. In Pate, the evidence before the trial court included (a) testimony about the defendant's history of irrational, violent behavior -- virtually all of which had occurred at least six years prior to the trial; (b) seven year-old psychiatric hospital records -- which indicated, inter alia, that the defendant had recovered from his mental condition; and (c) testimony by four friends and relatives that the defendant was "insane." 383 U.S. at 378-382. On the other hand, the stipulated testimony of a psychiatrist who had examined the defendant only two or three months prior to trial stated that the

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[13] This conclusion necessarily follows from the fact that the only difference between the evidence before the state trial court in 1967 -- when that court three times found Mr. Blazak incompetent -- and the evidence before the judge in 1970 was Dr. Shankel's 1970 opinion that Mr. Blazak's paranoid schizophrenia then was in remission.

defendant "knew the nature of the charges against him and was able to cooperate with counsel." Id at 383. In addition, the defendant displayed "mental alertness and understanding" in colloquies with the trial court. Id. at 385.

2. By any measure, the evidence in Pate raised considerably less doubt about the defendant's competency to stand trial than the evidence before the state trial court in the instant case: The Pate defendant's history was less recent and spoke less directly to the defendant's incompetency to stand trial; the Pate defendant displayed no irrational behavior in court; and the expert testimony in Pate concluding that the defendant was competent to stand trial was far more recent (and uncontradicted by any other expert testimony). Nevertheless, this Court held in Pate that there was a reasonable doubt as to the defendant's competency to stand trial that required the trial court to conduct a hearing on that issue. Id. at 385-86. A fortiori, the same conclusion is required in this case.

C. The petitioners' attempt to distinguish Pate from this case (Pet. at 18) is without merit, in part because that attempt rests on important misstatements regarding the facts in Pate:

1. The petitioners' assertion that "defense counsel [in Pate] requested a competency evaluation and hearing" (Pet. at 18) is irrelevant: This Court concluded in Pate that it was "contradictory to argue that a defendant may be incompetent, and yet knowingly and intelligently 'waive' his right to have the court determine his capacity to stand trial" by failing to

request a competency hearing. Id. at 384; see also Medina v. California, supra, 112 S.Ct. at 2579.

2. The fact that "the defense [in Pate] was insanity [at the time of the offense]" (Pet. at 18) was not relevant to the question of whether a hearing should have been held on competency to stand trial. In Pate, the insanity defense figured in this Court's analysis only in the sense that that defense was the occasion for trial testimony by lay witnesses that the defendant was "insane." 383 U.S. at 383, 384.

3. The petitioners' assertion that "there was uncontradicted testimony [in Pate] about the defendant's past and present mental illness" (Pet. at 18) is flatly incorrect. As noted above, the evidence before the trial court in Pate included stipulated testimony by a psychiatrist, who had examined the defendant only two or three months prior to trial, that the defendant "knew the nature of the charges against him and was able to cooperate with counsel" -- i.e., that the defendant was competent to stand trial. 383 U.S. at 383.

4. The petitioner's assertion that "the prosecutor [in Pate] even concurred that the defendant should be evaluated" (Pet. at 18) is both misleading and immaterial. In fact, the prosecutor simply requested that the trial court permit the State's psychiatrist to testify that the defendant was "sane when he was examined [prior to trial]" -- for the purpose of rebutting the defendant's insanity defense. 383 U.S. at 383-84. In any event, since "a defendant whose competence [to stand trial] is in

doubt cannot be deemed to have waived his right to a competency hearing," Medina v. California, supra, 112 S.Ct. at 2579, a prosecutor's request for a competency hearing is no more relevant than a defendant's request for such a hearing.

D. The result reached by the Court of Appeals also is supported by this Court's decision in Drope v. Missouri, 420 U.S. 162 (1975):

1. In Drope, the evidence before the state trial court included a recent psychiatric report that (a) did not address the defendant's competency to stand trial; (b) indicated that the defendant had difficulty in "participating well" and in "relating"; (c) diagnosed the defendant as suffering from "[s]ocipathic personality disorder," "[b]orderline mental deficiency," and "[c]hronic [a]nxiety reaction"; and (d) noted that there was "no sign of the presence of any delusions, illusions, hallucinations, obsessions, ideas of reference, compulsions or phobias at this time." Id. at 164-65, n. 1. In addition, the defendant's wife testified to strange behavior by the defendant, including the fact that he had tried to choke her shortly before the trial; and the defendant shot himself on the morning of the second day of trial. Id. at 165-66. This Court held that this evidence, taken together, "created a sufficient doubt of [the defendant's] competence to stand trial to require further inquiry on that question." Id. at 180.

2. The evidence before the trial court in Drope raised less doubt about the competence of the defendant to stand trial than

the evidence before the state trial court in this case. In Drope, unlike this case, there were no expert opinions indicating that the defendant was not competent to stand trial -- and the only psychiatric report that was before the trial court in Drope suggested that the defendant did not suffer from any mental illness that would affect his competency. Moreover, the conduct of the defendant in Drope, while in some respects more dramatic than Mr. Blazak's bizarre in-court conduct (see Statement of the Case, supra, at 7-8), spoke less directly to his ability to understand the charges against him and assist in his own defense.

3. The petitioners' attempt to distinguish Drope (Pet. at 18-19) is flawed in many of the same respects as their attempt to distinguish Pate (see Argument Section III(C), supra at 21-23). Most importantly, as the preceding paragraphs have demonstrated, the petitioners' assertion that "there was uncontradicted testimony [in Drope] about the defendant's mental illness" (Pet. at 18) is misleading at best. Moreover, the petitioners' effort to dismiss Mr. Blazak's bizarre in-court conduct as "independently insignificant" (Pet. at 19) flies in the face of Drope itself -- in which this Court recognized that the defendant's strange conduct was significant even if it did not independently create a sufficient doubt as to the defendant's competence to stand trial. 420 U.S. at 180.

E. Judge Brunetti's dissenting opinion below rests on reasoning that is flawed in several respects:

1. Inexplicably, that opinion fails to address at all this

Court's holdings in Pate and Drope, supra. 1 F.3d at 901-903, Pet. App. C at 33-43.

2. Judge Brunetti places undue emphasis on the theory that Mr. Kashman's failure to request a competency hearing indicated an "apparent belief" that Mr. Blazak was competent. 1 F.2d at 902, Pet. App. C at 40. As noted above, this Court has made it clear that a defendant cannot waive his right to have the court determine his capacity to stand trial by failing to request a competency hearing. Pate v. Robinson, supra, 383 U.S. at 384; Medina v. California, supra, 112 S.Ct. at 2579. Moreover, Mr. Kashman's "apparent belief" in Mr. Blazak's competence cannot reasonably be accorded any weight in this case, given that Mr. Kashman was unaware of Mr. Blazak's history of mental illness and Mr. Kashman's District Court testimony that he would have requested a competency hearing if he had known about that history. 1 F.3d at 899, n. 12, Pet. App. C at 30.[14]

3. Judge Brunetti's analysis also places undue emphasis on the fact that the psychiatric reports that concluded that Mr. Blazak was not competent were several years old as of 1974, 1 F.3d at 901-902, Pet. App. C at 37-41:

a. It is no doubt true, as a matter of common sense, that a psychiatric report indicating incompetency in the past may lose some of its probative value with the passage of time, at

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[14] One of the habeas claims that the Court of Appeals did not adjudicate was that Mr. Blazak was denied effective assistance of counsel at trial, in part because of Mr. Kashman's failure to investigate Mr. Blazak's competency to stand trial. 1 F.3d at 892, Pet. App. C at 5.

least when subsequent facts point to present competence. See Chavez v. United States, 656 F.2d 512, 518 (9th Cir. 1981). But as Pate so clearly demonstrates, the passage of time (even a longer time than that involved in this case) does not easily remove a previously established doubt as to competency, even when -- as in Pate, but not the instant case -- the trial court has before it a very recent expert opinion that the defendant is now competent to stand trial. (See Argument Division III(B), supra, at 19-20).

b. Moreover, in this case there are several reasons, not present in Pate, why the passage of time between the findings that Mr. Blazak was not competent and his 1974 trial did not vitiate the bona fide doubt as to his competency: (1) the 1970 finding that Mr. Blazak was competent apparently was based on Dr. Shankel's conclusion that Mr. Blazak's serious illness was then in remission (suggesting that it might reassert itself at a later date); (2) the state trial court, unlike the trial court in Pate, had no recent psychiatric reports or other intervening facts before it in 1974 that indicated that Mr. Blazak was then competent; and (3) Mr. Blazak's bizarre conduct in the 1974 pretrial proceedings (which contrasts with the Pate defendant's "mental alertness and understanding" in court proceedings) was consistent with a re-emergence of his mental illness.

4. In short, Judge Brunetti's opinion -- like the pending Petition for Certiorari -- incorrectly evaluates the evidence that was before the state trial court as if the question was

whether a preponderance of that evidence showed that Mr. Blazak in fact was incompetent -- rather than whether the evidence created a bona fide doubt as to Mr. Blazak's competency that required further judicial inquiry under Pate v. Robinson and Drope v. Missouri, supra. As Judge Tang's opinion demonstrates, the correct answer to the correct question leads to the conclusion that the state trial court's failure to hold a hearing on Mr. Blazak's competency to stand trial violated due process.

CONCLUSION

The primary question that the pending Petition presents for review by this Court was not raised below; was not addressed by or germane to the Court of Appeals' decision; and has been settled -- adversely to the petitioners -- by Pate v. Robinson, supra. Moreover, the issue that was decided by the Court of Appeals is not appropriate for review on certiorari because it turns solely on the application of well established legal rules to a highly specific set of facts. Finally, the decision of the Court of Appeals was correct on the merits.

Except for the dissenting judge on the Court of Appeals panel, no judge on the Ninth Circuit Court of Appeals concluded that there was sufficient reason to grant rehearing en banc in this case. Similarly, there is no sufficient reason to grant the pending Petition for a Writ of Certiorari.

RESPECTFULLY SUBMITTED April 20, 1994.

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APPENDIX L

Excerpts from Respondent Blazak's
Opening Brief
in the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 91-16549
No. 91-16562

(D.C. No. 90-446-TUC-RMB)

MITCHELL THOMAS BLAZAK,

Petitioner/Appellee/Cross-Appellant,

vs.

JAMES RICKETTS, et al.,

Respondents/Appellants/Cross-Appellees.

Appeal from the United States District Court
for the District of Arizona

PETITIONER'S OPENING BRIEF

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STATEMENT OF THE ISSUES

1. [CLAIM 1] Whether the evidence presented by the prosecution -- which consisted of (a) testimony by an immunized alleged accomplice that the District Court found to be a non-credible "mass of contradictions" and (b) misleading hair-comparison evidence that in fact had no probative value -- was sufficient to sustain Petitioner's capital convictions as a matter of Due Process.

2. [CLAIM 2] Whether the prosecution deprived Petitioner of his due process rights under Hicks v. Oklahoma, 447 U.S. 343 (1980), when it failed to offer any genuinely probative evidence that corroborated the testimony of an alleged accomplice.

3. [CLAIMS 3 AND 4] Whether the prosecution violated Petitioner's due process rights when it introduced false and misleading hair-comparison evidence which purported to connect Petitioner to the crime, but which in fact was of no probative value.

4. [CLAIM 5] Whether newly discovered evidence -- showing (a) that a solid blue ski mask (Exhibit MX) which was unearthed from the accomplice's front yard, and which contained hairs that did not match Petitioner's, was the mask worn by the actual perpetrator, (b) that the multi-colored mask (Exhibit 34) introduced by the prosecution was not the perpetrator's mask, and (c) that law enforcement officers tampered with hair samples purportedly derived from Exhibit 34 -- requires a new trial as a matter of fundamental fairness.

5. [CLAIM 6] Whether the prosecution violated Petitioner's due process rights when it failed to disclose that its key witness was released from custody, in anticipation of the dismissal of pending felony charges against him, shortly after he testified against Petitioner and denied that he had any "deal" with the prosecution regarding the pending felony charges.

6. [CLAIM 8] Whether Petitioner was denied effective assistance of counsel when his trial counsel (a) advised Petitioner not to take the stand in his own defense because of prior convictions that counsel should have known were facially invalid; (b) failed to request a determination of Petitioner's competency to stand trial, even though Petitioner's history of mental illness was readily available from reported case decisions; (c) failed to introduce evidence of false testimony by the State's main witness; (d) failed to present evidence promised to the jury in opening statement; and (e) failed to pursue exculpatory evidence (described under Issue 4, supra) without any valid tactical reason.

7. [CLAIMS 9 AND 10] Whether Petitioner's absence from critical proceedings violated his right to Due Process and his right to counsel.

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN PETITIONER'S CONVICTION AS A MATTER OF DUE PROCESS (CLAIM 1)

It is common wisdom among criminal defense attorneys that a claim of insufficiency of the evidence is not a preferred basis for challenging a conviction. Nevertheless, the first argument in this brief will be that there was insufficient evidence to support Mr. Blazak's conviction under the Due Process Clause of the Fourteenth Amendment.[4] There are two reasons for this organizational choice: (1) the insufficiency-of-the-evidence claim in this case is highly compelling; and (2) the facts that are pertinent to this claim will provide context for most of the remaining claims as well.

A. The Applicable Legal Standard.

The leading case concerning federal habeas corpus challenges to the sufficiency of the evidence to support a state criminal conviction is Jackson v. Virginia, 443 U.S. 307 (1979). In Jackson, the Court held that the controlling question was whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact "could have found the essential elements of the crime beyond a reasonable doubt." Id. at 319. This Court and other federal courts of appeals have used the Jackson standard to reverse

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[4] The insufficiency--of-the-evidence claim was adjudicated in Mr. Blazak's first direct appeal. State v. Blazak, 560 P.2d 54, 55-57 (Ariz. 1977).

convictions on the ground that the evidence was constitutionally insufficient. See, e.g., United States v. Barker, 951 F.2d 1074 (9th Cir. 1991); United States v. Still, 837 F.2d 871 (9th Cir. 1988); United States v. Gaviria, 740 F.2d 174, 183-84 (2d Cir. 1984); United States v. Mankani, 738 F.2d 538, 546-47 (2d Cir. 1984); Jones v. Thigpen, 741 F.2d 805, 812-14 (5th Cir. 1984); United States v. Joseph, 781 F.2d 549 (6th Cir. 1986).

Application of the Jackson standard of course involves substantial deference to the judgment of the jury. However, it is important to note one aspect of this case that significantly affects the degree of scrutiny with which this Court must review the sufficiency of the evidence: The fact that Mr. Blazak was sentenced to death. As noted above, the question that this Court must address is whether a rational fact-finder could have found Mr. Blazak guilty beyond a reasonable doubt. As a matter of logic and common sense, the level of doubt that is "reasonable" in any given case depends on the severity of punishment to be imposed on the defendant.

In this regard, the Supreme Court has recognized that the penalty of death, "the most irremediable and unfathomable of penalties," is, to put it simply, "different" -- and the Court therefore has required that factfinding procedures in capital

cases "aspire to a heightened standard of reliability." Ford v. Wainwright, 477 U.S. 399, 411 (1986). Consequently, the burden on the prosecution to show that there was sufficient evidence for a rational fact finder to conclude that the defendant was guilty beyond a reasonable doubt is uniquely heavy in a case, like this one, in which the defendant faces capital punishment.

B. Summary of the Prosecution's Case

There is no dispute in this case that a gunman wearing a ski mask entered the Brown Fox Tavern in Tucson, Arizona, on the evening of December 14, 1973, demanded money from the bartender, and, when his demand was refused, shot and killed the bartender and one patron and wounded another patron. What is in dispute, however -- and what the prosecution failed to prove with sufficient evidence to support a conviction under the Due Process Clause -- is that the gunman was Mitchell Blazak.

At Mr. Blazak's 1974 trial, the prosecution called seventeen witnesses in its case in chief, including three of the four patrons of the Brown Fox Tavern who saw the shooting. (ER-2 through ER-6). However, most of these witnesses, including the three eyewitnesses, provided no evidence identifying Mr. Blazak as the perpetrator of the crime. In the end, the State's case against Mr. Blazak rested on two bits of evidence: (1) the testimony of an immunized alleged accomplice, Kenneth Pease, that Mr. Blazak was the gunman; and

(2) testimony which sought to establish (a) that Exhibit 34, a ski mask found near the intersection of River and Allen Roads on December 15, 1973, was the ski mask worn by the gunman, and (b) that Mr. Blazak had worn that ski mask.

The following subsections of this Memorandum will examine these bits of evidence in some detail and then show: (1) that the accomplice's testimony was so lacking in credibility that it could not be regarded as constitutionally sufficient to form the basis for a conviction; and (2) that the evidence connected with the ski-mask, while it created an aura of scientific objectivity, in fact was without any probative value whatsoever.

C. The Testimony of Kenneth Pease.

In early July of 1974, almost seven months after the Brown Fox Tavern killings, Kenneth Pease was arrested on bad-check charges in Truth or Consequences, New Mexico. When Pease was first questioned by New Mexico authorities about the Brown Fox Tavern incident, he denied any knowledge thereof. (T. 11/15/74, ER-3 at 5).[5] Several days later, however, after receiving a grant of immunity from Arizona officials, Pease gave a statement claiming that Mr. Blazak was the gunman in the Brown Fox Tavern homicides, and that Pease was Mr.

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[5] When appropriate for purposes of clarity, this Brief will indicate the date of the transcript to which it is citing. However, because many of the page numbers on the state court transcripts are illegible, specific page citations will be given only to the Excerpts of Record.

Blazak's accomplice. (Ex. PD-102, ER-15 at 39-48). By the time of Mr. Blazak's trial in November 1974, Pease managed to give the following version of the events of December 14, 1973:

> At around 5:30 p.m., Pease went to Mr. Blazak's house. At about 6:15 to 6:30 p.m., Pease and Mr. Blazak drove with Mr. Blazak's next-door neighbor, Michael Blagg, to the Lazy Creek Farm, where they met several other individuals. (T. 11/14/74, ER-2 at 160-68).
>
> Pease left the Lazy Creek Farm with Blagg and Mr. Blazak at about 7:45 to 8:00 p.m. After dropping Blagg off and stopping at Pease's house, Pease and Mr. Blazak went to a store, where Mr. Blazak stole two ski masks. (Pease first testified that this store was at the corner of Craycroft and Fort Lowell Roads, but he later located it to Craycroft and Broadway Boulevard.) Pease and Mr. Blazak then went to several locations to "case" them as possible robbery targets, but did not actually attempt to rob them. (T. 11/14/74, ER-2 at 168-74).
>
> Finally, Pease and Mr. Blazak went to the Brown Fox Tavern, with the intent of robbing it. Mr. Blazak wore a solid blue ski mask, but Pease did not wear his mask (which was orange and white). Pease remained near the door of the tavern while Mr. Blazak approached the bar and demanded money from the bartender, who refused. Mr. Blazak then fired several shots. Pease ran from the bar with Mr. Blazak right behind him. The two men got into Pease's car and drove away. (T. 11/14/74, ER-2 at 177-79; T. 11/15/74, ER-2 at 11-12).
>
> After leaving the Brown Fox Tavern, Pease drove himself and Mr. Blazak around on several streets in the area, and finally to Mr. Blazak's house. Pease did not see Mr. Blazak throw any ski masks out of the car during this drive; and as Pease dropped Mr. Blazak off at his house, Mr. Blazak said that he would get rid of his mask and gun. Pease left his own ski mask in his car. (T. 11/14/74, ER-2 at 179-83).

D. <u>The Problems with Pease's Testimony</u>.

The preceding summary of Pease's trial testimony does not

address any of the problems that affected the credibility of that testimony. Those problems, however, were both numerous and devastating -- so much so that the District Court concluded that "Pease's testimony was a mass of contradictions," and that it was "questionable whether his testimony, standing alone, would meet the constitutional test for supporting a conviction." (ER-13 at 32).

1. Testimony by accomplice

By his own testimony, Pease was the accomplice of the gunman at the Brown Fox Tavern. While the testimony of an accomplice was admissible, the law in Arizona, as in most jurisdictions, regarded such testimony as sufficiently suspect that it could not alone form the basis for a conviction. A.R.S. §13-136 (1971); State v. Springer, 102 Ariz. 238, 428 P.2d 95 (1967).

2. Grant of immunity

As noted above, Pease testified under a grant of immunity that protected him from prosecution for the Brown Fox Tavern homicides. Of course, as an accomplice of the gunman, Pease was as guilty of first-degree felony murder as the gunman himself. Pease must have known that if he did not testify against Mr. Blazak, he would lose his immunity and expose himself to the death penalty.[6]

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[6] The courts have recognized that both accomplice testimony and immunized testimony are inherently suspect. See Lee v. Illinois, 476 U.S. 530, 541 (1986) ("when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the

3. Conflict with testimony of Shirley Brooks.

As noted earlier, Pease testified that Mr. Blazak wore a solid blue ski mask. However, Shirley Brooks, the assistant manager at the Ben Franklin store at which Pease claimed Mr. Blazak had stolen the ski masks, testified that her store did not carry solid-colored ski masks. (T. 11/15/74, ER-3 at 79). Moreover, Exhibit 34, which the State offered at trial as the ski mask that the gunman had worn, was purple with red, white, and black markings, not solid blue.[7] Finally, while Pease testified that there were no eyeholes in his ski mask, and that he cut some in it at a later time (T. 11/15/74, ER-3 at 15-16), Ms. Brooks testified that her store did not sell ski masks without eyeholes. (Id. at 74-75).

4. Inconsistencies with regard to timing.

As noted previously, Pease testified that he picked up Mr. Blazak at his home at about 5:30 p.m.; that they went to Lazy Creek Farm with Michael Blagg at about 6:15 at 6:30 p.m.; and that they left Lazy Creek Farm at about 7:45 to 8:00 p.m. However, in his pre-trial statement to the police, Pease stated that he was "sure" that Mr. Blazak had arrived at Pease's welding shop between 7:00 and 8:00 p.m. on December 14, 1973 (Ex. PD-102, ER-15 at 42); and Pease told Mr. Blazak's attorney shortly before trial that he and Mr. Blazak

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accusation is presumptively suspect"); People of Territory of Guam v. Dela Rosa, 644 F.2d 1257 (9th Cir. 1980).

[7] Counsel for Mr. Blazak have requested the District Court to transmit Exhibit 34 to this Court.

had left the Lazy Creek Farm at about 9:00 p.m. (T. 11/15/74, ER-3 at 33-34).

Pease's pre-trial version of the timing of events was confirmed by all of the other witnesses who testified. Garnet Shields, Patrick Shields, and Daniel Kegarise -- all of whom were at Lazy Creek Farm -- testified that Pease, Michael Blagg, and Mr. Blazak left Lazy Creek Farm at or after 9:00 p.m. (T. 11/15/74, ER-3 at 123; T. 11/18/74, ER-4 at 78; T. 11/19/74, ER-5 at 62). Moreover, Karen Pease, Kenneth's wife, testified that Pease returned home briefly on the evening of December 14 shortly after 9:00 p.m. (T. 11/19/74, ER-5 at 13). This timing issue is of particular importance because the store at which Pease claimed Mr. Blazak stole the ski masks closed at 9:00 p.m. on December 14, 1973. (T. 11/15/74, ER-3 at 69).

Another discrepancy in Pease's story with regard to the timing of events is equally significant. Pease testified that Mr. Blazak left the Lazy Creek Farm during the evening of the homicides (December 14, 1973) in Pease's car together with Michael Blagg and Danny Kegarise. (T. 11/14/74, ER-2 at 167-68). During a pre-trial interview with defense counsel, Pease stated that Mr. Blazak, Blagg, and Kegarise left the Lazy Creek Farm on December 14, 1973, to throw rocks at a trailer belonging to the Pennington family. (Ex. C, ER-15 at 24). In fact, however (as the State stipulated following Mr. Blazak's trial), the rock-throwing incident at the Pennington's

occurred four days before the Brown Fox homicides, December 10, 1973. (Id.)[8]

5. Perjury with regard to events of the morning following the crime

Pease testified that at about 7:30 or 8:00 o'clock on the morning following the Brown Fox Tavern homicides, Mr. Blazak came to his residence and showed him a newspaper article about the incident. (T. 11/15/74, ER-3 at 9-10). In fact, however, no such article appeared in any newspaper. (Ex. B; ER-15 at 22-23). Moreover, Victoria Blagg, Mr. Blazak's neighbor, testified that Mr. Blazak came to her home at approximately 6:15 in the morning on December 15, 1973, and that she and Mr. Blazak went to Nogales for the day with her husband, Michael Blagg. (T. 11/19/74, ER-5 at 31, 33-34).

6. Inconsistent statements regarding the motivation for the killings.

Contrary to Pease's testimony that the Brown Fox Tavern homicides occurred in the course of a planned robbery, Danny Chandler testified that Pease told him that the killings were professional assassinations. (T. 11/18/74, ER-4 at 66-67). Pease admitted making this statement, but testified that he did so in order to "con" money from Chandler -- albeit without

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[8] It is important to remember that Pease did not accuse Mitchell Blazak of these crimes until nearly seven months later. The trial was held nearly a year after the homicides. The independent witnesses from Lazy Creek Farm -- Mr. and Mrs. Shields and Danny Kegarise -- spoke of an evening in December of 1973. They could well have been speaking of December 10 when they related the events they believed took place on December 14.

any real explanation of how the statement might have this effect. (T. 11/15/74, ER-3 at 8-9).

7. Unsubstantiated details.

Pease testified that shortly before the shootings, Mr. Blazak stated, "The god damn safety's stuck." (T. 11/14/74, ER-2 at 177). However, none of the other eyewitnesses heard such a statement, suggesting that it was a fabricated detail. Pease also testified that as he and Mr. Blazak entered the Brown Fox Tavern, a blond woman exited and got into a pickup. (Id. at 176). However, none of the other eyewitnesses confirmed this detail, again suggesting fabrication.

8. Poor character for truthfulness.

Four witnesses who were acquainted with Pease testified that Pease was a dishonest, untrustworthy person. (T. 11/18/74, ER-4 at 71; T. 11/19/74, ER-5 at 70, 89, 94). Moreover, Pease was impeached with prior felony convictions for bad checks. (T. 11/15/74, ER-3 at 6).

9. Undisclosed dismissal of pending charges during jury deliberations

When he testified, Pease was officially in custody on a charge of drawing a check on insufficient funds. Pease testified that he had not been promised any deals apart from the grant of immunity concerning the Brown Fox Tavern incident. (T. 11/15/74, ER-3 at 31).[9]

[9] This testimony was backed up by his attorney on the bad-check charge, Mr. Alfred Donau (T. 11/19/74, ER-5 at 111, 113). However, Mr. Donau conceded that he had stated in a motion for continuance that he and the prosecution were

However, Kent Morgan, a Tucson Attorney, testified that when he went to the South Tucson jail to interview a client on two occasions shortly before Mr. Blazak's trial, Pease escorted him in and out of the jail as if he were an employee. Pease told Morgan that his six months of incarceration were almost over, that he was "working on a case," and that he would be at the jail for another week and a half to testify in the Brown Fox Tavern case. (T. 11/19/74, ER-5 at 100-105).

More importantly, after the prosecution's closing argument in Mr. Blazak's case but while the jury was still deliberating, Pease was released from custody, without notice to Mr. Blazak or his counsel. (T. 12/20/74, ER-7 at 126, 157-58). The bad-check charge officially was dismissed nine days later. (Id. at 123).

These events indicate that Pease was less than candid when he testified that there were no deals regarding the bad-check charge. This is made even more clear by Pease's 1991 deposition testimony: When counsel for Respondents asked Pease if he remembered "having an agreement that the check charge would be dismissed also," Mr. Pease responded, "I'm

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engaged in plea negotiations over the bad-check charge, (T. 12/20/74, ER-7 at 93-94) and he agreed to three continuances during his client's five-month incarceration Id. at 114-15; (T. 12/20/74, ER-7 at 91-94). This conduct was reasonable only if Mr. Donau believed there was a very real prospect of a plea bargain. In any event, the record shows that the state decided to release Pease without any discussion with Mr. Donau. (ER-7 at 96-101).

sure my attorney had that worked out, yes." (ER-15 at 104).[10]

E. The Legal Relevance of Pease's Lack of Credibility.

As noted earlier, the District Court found that Pease's testimony was a "mass of contradictions," and it questioned whether that testimony, "standing alone, would meet the constitutional test for supporting a conviction . . . ." (ER-13 at 32). At the same time, however, the District Court also concluded that "the [state] trial court's assessment of Pease's credibility is entitled to a presumption of correctness and cannot form the basis for habeas relief." (ER-13 at 32-33).

As the following paragraphs will demonstrate, the District Court's view that it was totally without power to consider Pease's credibility in connection with Claim 1 was based on (a) a misinterpretation of Jackson v. Virginia and other legal precedents, and (b) the patently incorrect assumption that the state trial court had made an assessment of Pease's credibility. In fact, the District Court did have the power to consider Pease's credibility; and while that power certainly was limited, it applied to this case.

1. There is no question that in adjudicating an insufficiency-of-the-evidence claim under Jackson v. Virginia, supra, a federal habeas corpus court must view the evidence in

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[10] The implications of the secret dismissal of the bad-check charges against Pease under Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Bagley, 473 U.S. 667 (1985), are discussed in more detail in Division V, infra.

the light most favorable to the prosecution. However, Jackson recognized that "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." 443 U.S. at 317. Moreover, Jackson held that "[a] federal court has a duty to assess the historic facts when it is called upon to apply a constitutional standard to a conviction obtained in state court" -- without indicating that such an assessment could not include any evaluation of the credibility of the witnesses. Id. at 318.

2. The only sensible interpretation of Jackson is that a federal habeas corpus court may asses whether -- viewing the evidence in the light most favorable to the prosecution -- any rational trier of fact could have credited the prosecution's witness(es) to the point of finding the defendant guilty beyond a reasonable doubt. This conclusion is supported by United States v. Barker, 951 F.2d 1074 (9th Cir. 1991), in which this Court found that under Jackson, the testimony of a "claims analyst" that certain documents included false claims was not sufficiently credible to support the defendant's conviction for making false claims against the United States.

3. The District Court's reservations about its power to assess the credibility of Mr. Pease were based on Miller v. Fenton, 474 U.S. 104 (1985), and Marshall v. Lonberger, 459 U.S. 422 (1983). (ER-13 at 32-33). Those cases do limit the power of federal habeas corpus courts to reassess the

credibility of witnesses in certain circumstances. However, those circumstances are not present in this case, at least with respect to Mr. Pease:

a. In Miller, the Court held that the voluntariness of a confession was a mixed question of fact and law to which § 2254(d)'s presumption of correctness did not apply. 474 U.S. at 112. In dictum, the Miller Court gave the following example by way of contrast:

> When, for example, the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor, there are compelling and familiar justifications for leaving the process of applying law to fact to the trial court and according its determinations presumptive weight. Patton v. Yount, [467 U.S. 1025 (1984)], and Wainwright v. Witt, [469 U.S. 412 (1985)], are illustrative. There the Court stressed that the state trial judge is in a position to assess juror bias that is far superior to that of Federal judges reviewing an application for a writ of habeas corpus.

474 U.S. at 114.

b. In Marshall v. Lonberger, supra, the defendant/habeas petitioner alleged that his plea of guilty to various related offenses in Illinois was not knowing and voluntary, and therefore could not be used as an aggravating "specification" in his subsequent Ohio murder trial. After conducting a pre-trial hearing at which the defendant testified about his Illinois guilty plea, the Ohio trial court found that the plea was valid. 459 U.S. at 425-29. A federal district court denied habeas corpus relief, but the Sixth Circuit reversed, relying on the defendant's testimony at the Ohio pre-trial hearing. Id. at 430-31. The Supreme Court in

turn reversed the Sixth Circuit, holding that it was improper for that court to rely on testimony by the defendant that the state trial court necessarily had rejected in finding that the defendant's Illinois plea was valid:

> Title 28 U.S.C. § 2254(d) gives federal habeas corpus courts no license to redetermine the credibility of witnesses whose demeanor has been observed by the state trial court, but not by them.

Id. at 434.

c. In both the Miller v. Fenton "counter-example" and in Marshall v. Lonberger, two critical factors called for deference by the federal habeas corpus courts to state court credibility determinations: (a) the state trial judge had observed the juror/witness whose bias/credibility was in question, but the federal court had not; and (b) the state court actually had made a determination that the juror/witness was (or was not) biased/credible. However, neither of these factors is present in this case with respect to Mr. Pease:

i. The District Court saw Mr. Pease testify via the videotaped deposition of June 3, 1991 (ER-14 at 6; ER-15 at 49-112), and therefore could make an evaluation of his demeanor.

ii. More importantly, the state court has never made any determination regarding Pease's demeanor or credibility. Of course, Mr. Pease did testify at the 1974 trial. However, there is no way to know whether the jury found him to be a credible witness, as its verdict may have been based on the State's ski-mask evidence (see Division

I(F), pp. 24-26 infra) -- which was presented by the State as having very substantial probative value (even though it in fact had none). Moreover, the state trial judge made no finding as to Pease's credibility, either at the 1974 trial or at any of the subsequent post-conviction proceedings.

4. In sum, the District Court had a duty under Jackson v. Virginia to assess whether the evidence presented by the State, including the testimony of Kenneth Pease, was sufficiently credible that the jury rationally could have found Mr. Blazak guilty beyond a reasonable doubt. Because the state courts have made no determination regarding Mr. Pease's credibility, that duty is not affected by any "presumption of correctness" under 28 U.S.C. § 2254(d).

5. Division I(D), supra, already has analyzed some of the many reasons why Pease's testimony was not credible. As the District Court recognized despite its failure to grant relief on Claim 1, Pease's testimony by itself could not reasonably be regarded as sufficient to support a rational finding of guilt beyond a reasonable doubt -- especially in a case in which the defendant has been sentenced to death.

F. Testimony Concerning State's Exhibit 34.

Besides the testimony of Kenneth Pease, the only prosecution evidence of any significance revolved around State's Exhibit 34, a bright purple ski mask with a red top-knot and red, white, and black markings that was found some distance from the Brown Fox Tavern the morning after the

crimes in question. The State's theory at trial was (a) that Exhibit 34 was the mask that the gunman wore when he committed the crimes at the Brown Fox Tavern, and (b) that certain "unknown" human hair fragments obtained from Exhibit 34 matched "known" hairs obtained from Mr. Blazak in all discernible respects.

The State relied heavily on the above-described "hair evidence" at trial, and the District Court found that this evidence was "crucial to the State's case." (ER-13 at 45). However, the record shows that the State's "hair evidence" theory was fatally flawed in several respects, and that the hairs that purportedly were obtained from Exhibit 34 in fact had no probative value on the issue of Mr. Blazak's guilt. To see why this is so, it is necessary to begin with an outline of the State's view of the evidence relating to Exhibit 34, which -- without its many flaws -- was as follows:

> Exhibit 34 was found by Ms. Frances Baker near the intersection of River and Allen Roads on the morning of December 15, 1973. (This location was on the escape route described by Pease.) (T. 11/15/74, ER-3 at 58-59). Ms. Baker turned the ski mask over to Tucson Police Officer Stephen Zimmerman, who transported it to the Police Department property division in his car. (Id. at 81, 84, 85).
>
> Captain Carl Kempe, of the Tucson Police Department and Pima County Crime Laboratory, subsequently examined Exhibit 34 and removed animal hairs and two human hairs from it. (T. 11/18/74, ER-4 at 23, 27, 28). One of the human hairs was 5.5 centimeters (cm.) long, and the other human hair was very small. (Id. at 37). Kempe placed the hairs from Exhibit 34 on a green piece of paper and folded it up; this piece of paper was marked at trial as State's Exhibit 49. (Id. at 21, 21).

On July 12, 1974, Kempe compared the hairs he had taken from Exhibit 34 with known hair samples from Mr. Blazak (marked at trial as Exhibit 47); he testified that these hairs "appeared similar" to each other. Kempe then returned the hair samples to the property division. (Id. at 23, 26).

On July 22, 1974, Detective Larry Hust of the Tucson Police Department sent Exhibits 47 and 49 to the FBI for a comparison test. (Id. at 13). FBI agent Morris Clark performed the microscopic comparison. At trial, Mr. Clark testified that the "unknown" human hairs obtained from the ski mask matched the samples of Mr. Blazak's hair in "the full range of characteristics that they exhibited"; that the hairs found in the ski mask could have come from Mr. Blazak; but that the hairs did not provide a basis for a positive identification. (Id. at 48, 58). Mr. Clark also testified that the package of hairs purportedly removed from the ski mask included three human hairs (rather than two, as Captain Kempe had testified); Agent Clark speculated that "maybe [Captain Kempe] just didn't notice" the third hair.[11] (Id. at 51).

The preceding summary shows that even at its best, the testimony regarding Exhibit 34 was not highly persuasive of Mr. Blazak's guilt, since FBI Agent Clark could only testify that the hairs allegedly found on the ski mask could have come from Mr. Blazak -- not that they did come from Mr. Blazak, or even that they probably came from Mr. Blazak. But even the modest probative value that Agent Clark's testimony otherwise might have had was completely undone by a number of serious problems with Exhibit 34 and the hair samples that Agent Clark examined. These problems are discussed below.

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[11] This theory cannot reasonably be supported. See Division I(G)(2), pp. 32-36 infra.

G. The Total Lack of Probative Value of Exhibit 34 and the State's "Hair Evidence".

1. Exhibit 34 was not the mask worn by the Brown Fox Tavern gunman

As noted previously, the probative value of the State's "hair evidence" hinged on the theory that Exhibit 34 was the ski mask worn by the Brown Fox Tavern gunman. However, the record clearly shows that the gunman's mask was not Exhibit 34 -- but probably was Exhibit MX, a solid blue ski mask that was uncovered some years after Mr. Blazak's trial.

a. The testimony of Kenneth Pease

Exhibit 34 had no possible relevance in the absence of Pease's testimony that the intersection near which it was found by Mrs. Baker on December 15, 1973, was on the escape route that Pease and the gunman followed from the Brown Fox Tavern. However, Pease himself testified that the gunman's mask was solid blue (as noted earlier, Exhibit 34 was bright purple with red, white, and black markings). Even more importantly, Pease specifically testified that Exhibit 34 was not the gunman's mask. (T. 11/15/74, ER-3 at 11-12, 19, 34).

b. The testimony of the other eyewitnesses

Besides Pease, three prosecution witnesses -- all of whom were patrons of the Brown Fox Tavern on the night in question -- saw the gunman's ski mask: Lonnie Short, Robert Bennett, and Roy Sneed. All three of these eyewitnesses have testified that Exhibit 34 was not the mask worn by the gunman:

i. At the 1974 trial, Mr. Short testified that the gunman's mask was "dark blue." (T. 11/14/74, ER-2 at 137, 141). Moreover, at the July 30, 1991, evidentiary hearing in the District Court, Mr. Short testified quite definitely that Exhibit 34 did not look like the gunman's mask, specifically noting that the gunman's mask (a) did not have a tassel on top, (b) did not have white around the eye-holes, and (c) was a darker color than Exhibit 34. (T. 7/30/91, ER-14 at 44).[12]

ii. Robert Bennett initially testified that Exhibit 34 "looks like it," and he pointed out some similarities between Exhibit 34 and the gunman's mask. However, Mr. Bennett then added: "but this -- I don't think it had a black mouth, the one I seen, and I was awful close." (T. 11/14/74, ER-2 at 147, 151). (Exhibit 34 has black coloring around the mouth.) Moreover, when Mr. Bennett was shown Exhibit A[13] -- a ski mask identical in every respect to Exhibit 34 -- he stated that he did not recognize it, and that its top did not "look familiar" to him. Finally, with respect to Exhibits 34 and A, Mr. Bennett testified as follows:

> Q: So neither one of these masks as far as you are concerned is what you saw that night?
>
> A: As far as I am concerned, no, I thought it was white around the mouth and the eyes with a red tassel on top.

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[12] At the 1974 trial, the prosecution did not show Mr. Short Exhibit 34 -- apparently with good reason. (ER-2 at 135-141).

[13] Petitioner's counsel have requested that the District Court transmit Exhibit A to this Court.

(T. 11/14/74, ER-2 at 155-56).

iii. When Mr. Sneed was shown Exhibit A and was asked if he recognized it "as one similar to the mask that you observed that night," Mr. Sneed responded: "Well, it doesn't have as much red on it that I thought the mask had." Moreover, when he was asked whether Exhibit A appeared to be the mask that he remembered from the Brown Fox Tavern, he responded: "Well, not the purple of it." (T. 11/14/74, ER-2 at 128-29).

c. Exhibit A.

Exhibit A is a ski mask -- completely identical to Exhibit 34 -- that also was found in the vicinity of the Brown Fox Tavern on the morning of December 15, 1973. (T. 11/19/74, ER-5 at 5-6). Because Pease testified that the second ski mask that the gunman stole in preparation for the robbery was orange (T. 11/15/74, ER-3 at 15), rather than purple (as both Exhibits A and 34 are), the State's theory must be that someone not connected with the Brown Fox Tavern incident independently, and coincidentally, disposed of Exhibit A at about the same time that the gunman was disposing of Exhibit 34. But this "coincidence" is beyond rational belief. The only plausible explanation is that a single person who had nothing to do with the Brown Fox Tavern disposed of both Exhibit A and Exhibit 34.

d. Exhibit MX

While the preceding points are more than enough to

demonstrate that Exhibit 34 was not the gunman's mask, still more evidence of this fact is provided by Exhibit MX -- a solid dark blue ski mask which, more than three years after Mr. Blazak's trial, was dug up out of the front yard of the house in which Pease had resided at the time of the Brown Fox Tavern incident.[14] (Ex. LX, ER-15 at 19-20). Testimony developed in the District Court proceedings strongly suggests that Exhibit MX, rather than Exhibit 34, was the Brown Fox Tavern gunman's mask:

i. At the evidentiary hearing in the District Court, Lonnie Short testified to his recollections of the events at the Brown Fox Tavern, including the ski mask worn by the gunman. When Mr. Short was shown Exhibit MX, he spontaneously volunteered: "It looks like the same one I seen when he [the gunman] went out the door." (T. 7/30/91, ER-14 at 43-44). Mr. Short then commented more specifically that Exhibit MX was similar to the gunman's mask in that it was "tore around the eyes" and "dark blue." (Id. at 44).

ii. At a deposition taken on June 3, 1991, Kenneth Pease was shown Exhibit M-X. His reaction was as follows:

> Q. (BY MR. BARTELS) Mr. Pease, I'm going to show you what has previously . . . been labelled Exhibit MX. . . . Have you had a chance to look at it? Is Exhibit MX the mask that Mr. Blazak --
>
> A. I wouldn't have any idea if that was the one or not. . . . It looks like it, but I can't tell you yeah, that's the one. There's no way I could tell you that.

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[14] Petitioner's counsel have requested that the District Court transmit Exhibit MX to this Court.

* * * *

Q. Okay. But this looks like the mask that Mr. Blazak --

A. It looks like the mask, yes, sir.

(Ex. 1, ER-15 at 60-61, emphasis added; see also id. at 96).

Of course, Mr. Pease did not say that Exhibit MX definitely was the gunman's mask. But more than seventeen years after the events in question, one could not reasonably expect Pease to say anything more than what he did say: that Exhibit MX "looked like" the gunman's mask.[15] Moreover, Pease's 1991 deposition testimony was consistent with his 1974 trial testimony that the gunman's mask was a solid dark blue color, and that Exhibit 34 was not the gunman's mask. (T. 11/15/74 at 11-12, 19, 34). Finally, Pease testified that the gunman's mask had eye holes "cut out of it," and that it

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[15] In this regard, it should be noted that most of the time gap between the Brown Fox Tavern incident and Pease's opportunity to view Exhibit MX is attributable to the State. In 1978, prior to a state-court post-conviction hearing regarding Exhibit MX, Mr. Blazak's attorney sought to depose Pease, but the prosecution refused to disclose Pease's whereabouts. (T. 12/15/78, ER-10 at 8-12). Moreover, when Mr. Blazak's attorney attempted to subpoena Pease to appear at a hearing, the prosecution indicated that Pima County authorities were in contact with Pease and gave assurances that he would appear. However, the state court denied Mr. Blazak's motion to continue the hearing to ensure Pease's presence, and Pease failed to appear. (T. 2/7/79, ER-11 at 24-25). At his June 3, 1991, deposition, Pease was definite and emphatic that he had never before been questioned about Exhibit MX or about any ski mask having been dug up out of his front yard, and that he had never told Pima County authorities that he would go back to Tucson to testify in this case. (Ex. 1, ER-15 at 62-62, 74-75). That testimony suggests that Pima County authorities deliberately misled the state court and Mr. Blazak's attorney regarding Pease's availability to testify in 1979.

looked like the eye holes on Exhibit MX also were "cut out" (i.e., like "[s]omebody grabbed it up and cut it"). (Ex. 1, ER-15 at 59-60, 108-109).[16] This fits with Pease's 1974 trial testimony that the gunman stole two ski masks from the same store, and that Pease had to cut eye holes in his mask. (T. 11/14/74, ER-2 at 170, 172; T. 11/15/74, ER-3 at 15-16).[17]

iii. The foregoing evidence concerning Exhibit MX obviously indicates that State's Exhibit 34 was not the Brown Fox Tavern gunman's mask. Moreover, additional evidence regarding Exhibit MX affirmatively exculpates Mr. Blazak. This additional evidence is discussed more fully in Division IV(A) (pp. 48-53), infra.

e. Summary re Exhibit 34

The supposed probative value of the State's "hair evidence," including the crucial hair-comparison testimony of FBI agent Clark, depended completely on whether Exhibit 34 -- from which the "unknown" hairs that Agent Clark examined purportedly were obtained -- was the mask worn by the Brown Fox Tavern gunman. But the preceding paragraphs have shown

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[16] At the June 3, 1991, deposition, the State's leading questions created some apparent confusion about what Pease meant by "cut out." (Ex. 1, ER-15 at 96-97). In the end, however, this confusion did not alter the fact that Pease testified that both the gunman's mask and Exhibit MX had eye holes that were "cut out" (Ex. 1, ER-15 at 59-60, 108-109) -- and it is apparent from Exhibit MX itself that its eye holes were cut out by hand.

[17] Counsel for Petitioner were not able to locate the other two witnesses, Robert Bennett and Roy Sneed, who saw the gunman's mask, and their testimony about Exhibit MX therefore was not available.

that there is overwhelming, uncontradicted evidence from every eyewitness that Exhibit 34 was not the gunman's mask. Consequently, the probative value of the State's "hair evidence" was zero.

2. The "unknown" hairs purportedly obtained from Exhibit 34 could not have been the same "unknown" hairs about which FBI Agent Clark testified at the trial

The preceding paragraphs regarding Exhibit 34 are sufficient to require reversal of Petitioner's convictions under Claim 1. However, even if one assumed (contrary to the evidence) that Exhibit 34 was the Brown Fox Tavern gunman's mask, the State's "hair evidence" still would have no probative value -- because it is clear that the "unknown" hairs about which FBI Agent Clark testified at the 1974 trial could not have been the same hairs that Captain Kempe purportedly retrieved from Exhibit 34 on December 17, 1973.

a. Physical discrepancies between the "Kempe" hairs and the "Clark" hairs

The fact that the "unknown" hairs about which FBI Agent Clark testified (hereinafter the "Clark hairs") could not have been the same as the hairs that Captain Kempe purportedly obtained from Exhibit 34 (hereinafter the "Kempe hairs") is plainly demonstrated by uncontradicted evidence concerning several inexplicable physical discrepancies between those hairs:

i. Captain Kempe testified that he found two human hairs and one animal hair on Exhibit 34 (T. 11/18/74, ER-4 at

37; see also notations on envelope containing Exhibit 34, ER-16 at 185). However, Agent Clark testified that he received three human hairs and one animal hair (T. 11/18/74, ER-4 at 46, 50-51; T. 6/16/77 [p.m.], ER-8 at 75).

ii. Captain Kempe testified that neither of the human hairs he removed from Exhibit 34 had root bulbs. (District Court Order of July 13, 1990, ER-13 at 37). However, Agent Clark testified that two of the three human hairs he received had root bulbs. (T. 11/18/74, ER-4 at 56; T. 6/16/77 [p.m.], ER-8 at 85-86). This difference by itself is enough to show that the Kempe hairs and the Clark hairs could not have been the same.

iii. At various times, Captain Kempe has attempted to explain the hair discrepancies by suggesting that a third hair might have been stuck to one of the two human hairs he retrieved from Exhibit 34, or that one of the hairs he retrieved from Ex. 34 broke in transit to the FBI. (T. 6/21/77, ER-9 at 139, 144, 145). Of course, neither of these attempted explanations would explain the above-noted discrepancy between Kempe and Clark concerning the presence of root bulbs on two of the "unknown" hairs. Moreover, Captain Kempe's post hoc rationalizations fail to explain discrepancies regarding the respective lengths of the Kempe and Clark hairs:

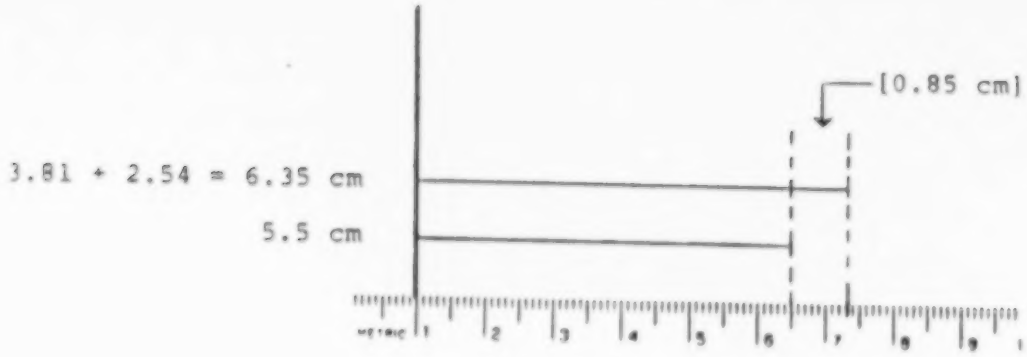
(a) Captain Kempe testified that the two human hairs he retrieved from Exhibit 34 were 5.5 cm and less than

one inch (2.54 cm) long, respectively. (T. 6/21/77, ER-9 at 120, 122, 131, 140). The 5.5-cm measurement was confirmed by contemporaneous notations Captain Kempe made on the envelope containing Exhibit 34 (ER-16 at 185).

(b) Agent Clark testified that the human hairs he received measured one and one-half inches (3.81 cm), one inch (2.54 cm), and seven eighths of an inch (2.23 cm). (T. 6/16/77 [p.m.], ER-8 at 86). Clark also testified that the 3.81-cm hair was broken on both ends; that the 2.54-cm hair had a root bulb on one end and was broken on the other; and that the 2.23-cm hair had a root bulb on one end and a razor cut on the other. (Id. at 87-89).

(c) Captain Kempe's primary "explanation" for the discrepancies between the Kempe and Clark hairs was that the longer (5.5-cm) hair that he retrieved from Exhibit 34 had broken into two pieces in transit to the FBI. Because the 2.23-cm hair that Agent Clark received had a root bulb on one end and a razor cut on the other, it could not have been the product of the breakage of a longer hair. Consequently, under Kempe's "breakage" theory, the 5.5-cm Kempe hair must have broken into the 3.81-cm and 2.54-cm Clark hairs. But there is an obvious and fatal problem with this theory: If the 3.81-cm and 2.54-cm Clark hairs had been the result of the breakage of a single longer hair, that hair would have had to measure at least 6.35 (3.81 + 2.54) cm -- which is 0.85 cm longer than Kempe's 5.5-cm hair. This unexplained difference is, in the

context of hair measurement, a very considerable one, as is illustrated in the following to-scale diagram:



(d) Captain Kempe's suggestion that two hairs might have stuck together when he retrieved the hairs from Exhibit 34 (and, apparently, when he examined the hairs on December 17, 1973, April 10, 1974, and July 12, 1974, see Exs. CX, 4X, and 5X, ER-15 at 14, 5, 6) obviously also does not square with the measurements of the Kempe and Clark hairs, for several reasons -- not the least of which is that Clark received no hair that was even close to 5.5 cm long. And in any event, the "stuck together" theory does not explain the fact that two of the Clark hairs, unlike the Kempe hairs, had root bulbs.[18]

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[18] The reasons for the physical discrepancies between the "Kempe hairs" and the "Clark hairs" need not be explained in order to require reversal on claim 1. However, the record does contain substantial evidence that those discrepancies resulted from evidence tampering by law enforcement officers. See Division IV (B) (pp. 53-55, infra).

b. Mishandling of Exhibit 34

While the physical discrepancies between the hairs that Captain Kempe purportedly removed from Exhibit 34 and the hairs that FBI Agent Clark examined by themselves render the State's "hair evidence" completely worthless, there is one more fact concerning Exhibit 34 that should be discussed in connection with Claim 1, if only for the sake of completeness. That fact is that prior to the time at which Kempe removed the hair samples from Exhibit 34, that exhibit was mishandled in such a manner as to seriously undermine the validity of any testing of its contents.

Frances Baker, who found Exhibit 34, simply put the ski mask -- which was turned inside out -- on the back seat of her car before calling the police. (T. 11/15/74, ER-3 at 59). When Tucson Police Officer Stephen Zimmerman subsequently retrieved the ski mask from Ms. Baker, he did not place it in a closed container to preserve any possible evidence, but instead put it in the console of his car before transporting it to the property division of the Tucson Police Department. (Id. at 81, 84, 85).

Obviously, the failure to protect Exhibit 34 prior to its arrival at the Police Department raised a significant possibility that it would pick up hairs that were not present when Ms. Baker found it. In fact, Captain Kempe himself recognized that the mishandling of the mask had contaminated its usefulness as evidence. (T. 11/18/74, ER-4 at 32-36).

Yet there is no indication in the record that anyone from the Tucson Police Department ever attempted to compare hair samples from Ms. Baker, her family, or Officer Zimmerman with those that were recovered from Exhibit 34.

H. Violation of Due Process Under Jackson v. Virginia.

The preceding pages have shown that the prosecution's case was based (1) on hair sample comparisons that were totally without any probative value, and (2) on the testimony of a witness who was an admitted accomplice, who had been given immunity from prosecution for a capital crime, and whose testimony was a wholly non-credible "mass of contradictions". The application of Jackson v. Virginia to these facts requires no extended discussion. The actual quantum of proof in this case simply was insufficient to permit a rational trier of fact to find Mr. Blazak guilty of a capital crime beyond a reasonable doubt. This conclusion is supported by decisions in which this Court has found evidence that was at least as strong as the evidence in this case to be insufficient under Jackson. See, e.g., United States v. Barker, 951 F.2d 1074 (9th Cir. 1991) (testimony by "claims analyst" that documents containing apparent inconsistencies included false claims insufficient to support conviction for making false claims against the United States); United States v. Still, 837 F.2d 871 (9th Cir. 1988) (insufficient evidence to show a "substantial step toward commission of the crime" of attempted bank robbery, despite overwhelming evidence of intent,

planning, and preparation); see also United States v. Gaviria, 740 F.2d 174, 183-184 (2d Cir. 1984) (insufficient evidence of conspiracy to possess cocaine with intent to distribute, even though defendant drove convicted co-defendant to "stash pad", acted in suspicious manner as she left the stash pad, lied on cross-examination when she denied driving rental car associated with the guilty co-defendant, and had seven grams of cocaine in her car).

II. THE STATE VIOLATED PETITIONER'S RIGHT TO DUE PROCESS WHEN IT FAILED TO INTRODUCE ANY EVIDENCE THAT GENUINELY CORROBORATED THE TESTIMONY OF THE ALLEGED ACCOMPLICE (Claim 2)

The facts discussed above in connection with Petitioner's Jackson v. Virginia insufficiency-of-the-evidence claim also show that the State violated Mr. Blazak's due process rights under Hicks v. Oklahoma, 447 U.S. 343 (1980), when it failed to introduce any evidence that genuinely corroborated the accomplice testimony of Kenneth Pease.[19] Indeed, this conclusion flows a fortiori from the analysis in Division I, supra.

In Hicks, the defendant was convicted of unlawful distribution of heroin, and the jury imposed a mandatory forty-year sentence pursuant to a state habitual offender statute. The state court of appeals affirmed this sentence

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[19] The insufficient-corroboration claim was adjudicated in Mr. Blazak's first direct appeal. State v. Blazak, 560 P.2d 54, 56-57 (Ariz. 1977).

reasons.[20] Consequently, there was no genuine evidence to corroborate Pease's accomplice testimony -- and the District Court therefore should have granted relief on Claim 2.

III. THE STATE'S INTRODUCTION OF HAIR-COMPARISON TESTIMONY THAT PURPORTED TO CONNECT PETITIONER WITH THE CRIME, BUT WHICH IN FACT HAD NO PROBATIVE VALUE, VIOLATED DUE PROCESS (CLAIMS 3 AND 4)

As noted previously, the State relied heavily on Exhibit 34 and the related hair-comparison testimony of Captain Kempe and FBI Agent Clark, and the District Court found that this evidence was "crucial to the State's case." (ER-13 at 45). However, Division I(G), supra, has shown that neither Exhibit 34 nor the hair-comparison evidence had any actual probative value. The State's introduction of valueless evidence in the guise of "scientific" evidence of guilt amounted to a use of false evidence that was so fundamentally unfair that it violated the Due Process Clause.[21]

A. Applicable Due Process Standards.

As the District Court recognized, the admissibility of

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[20] Part of the problem with the District Court's ultimate conclusion may have been that it attempted to deal with Claims 1 through 4 in a single paragraph which confused the issues presented by those claims, and which made reference only to the proper standard for determining Claims 3 and 4 -- viz., whether the "hair evidence" was "so unreliable as to amount to a denial of fundamental fairness." (Order of Sept. 10, 1991, ER-13 at 60).

[21] The admissibility of Exhibit 34 and the State's hair-comparison evidence was adjudicated in Petitioner's first direct appeal. State v. Blazak, 560 P.2d 54, 57-58 (Ariz. 1977).

evidence in a state court ordinarily is a matter of state law, and a violation of state evidentiary rules by a state court does not in itself justify habeas corpus relief. However, the District Court also recognized that evidence may be so unreliable and prejudicial that its admission amounts to a denial of fundamental fairness requiring habeas corpus relief -- and that "[e]ven a non-knowing use of flawed evidence will violate due process if there is a 'reasonable probability' that the outcome of the trial would have been different." (Order of July 13, 1990, ER-13 at 44-45). As the following paragraphs will show, these legal conclusions were fully supported by two related lines of federal case law.

1. Denial of fundamental fairness

Numerous circuit court decisions have held that the erroneous admission of evidence in a state criminal trial may result in a denial of fundamental fairness, and that habeas corpus relief should be granted in such cases. See, e.g., Dudley v. Duckworth, 854 F.2d 967, 970-72 (7th Cir. 1988); Williams v. Owens, 731 F.2d 391, 392 (7th Cir. 1983); Osborne v. Wainwright, 720 F.2d 1237, 1238-39 (11th Cir. 1983); Bisaccia v. Attorney General of New Jersey, 623 F.2d 307, 312-13 (3d Cir. 1980); Cronnon v. Alabama, 587 F.2d 246, 250 (5th Cir. 1979); Hills v. Henderson, 529 F.2d 397, 401 (5th Cir.), cert. denied, 429 U.S. 850 (1976); Barnard v. Henderson, 514 F.2d 744 (5th Cir. 1975). In some of these cases, the courts have looked to the extent to which the probative value of the

challenged evidence was outweighed by its prejudicial effect. See, e.g., Dudley, supra; Bisaccia, supra; and United States ex rel. Palmer v. DeRobertis, 738 F.2d 168, 170 (7th Cir.), cert. denied, 469 U.S. 924 (1984). In others, the courts have stated that the test is whether the improperly admitted evidence was "material in the sense of a crucial, critical, highly significant factor [in the outcome of the case]." Hills, supra, 529 F.2d at 401; Osborne, supra; Williams, supra.

2. Non-knowing use of false evidence

The Supreme Court long has held that the knowing use of false evidence violates the Due Process Clause. Miller v. Pate, 386 U.S. 1 (1967); Napue v. Illinois, 360 U.S. 264 (1958); Alcorta v. Texas, 355 U.S. 28 (1957); Pyle v. Kansas, 317 U.S. 213 (1942); Mooney v. Holohan, 294 U.S. 103 (1934). More recently, the Court also has made it clear that prosecutorial knowledge is not a prerequisite for a due process violation in this area:

a. In Brady v. Maryland, 373 U.S. 83 (1963), the Court held that a failure to produce evidence requested by the accused violated due process when the evidence was favorable and material to guilt or punishment, "irrespective of the good faith or bad faith of the prosecution." Id. at 87. The Court explicitly described this holding as "an extension of Mooney v. Holohan," and also discussed at length its prior holdings in Pyle v. Kansas, Napue v. Illinois, and Alcorta v. Texas,

supra. Id. at 86-87.

b. In United States v. Agurs, 427 U.S. 97 (1976), the Court held that the suppression of evidence favorable to the accused was a due process violation if that evidence created "a reasonable doubt that otherwise did not exist." Id. at 112. As in Brady, the Court stated that willfulness of the prosecutor was immaterial to his or her constitutional obligation: "If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." Id. at 110.

c. Finally, in United States v. Bagley, 473 U.S. 667 (1985), the Court held that the prosecution's failure to disclose favorable evidence violated due process if there was a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. at 682. Once again, this holding was without reference to the willfulness of the prosecution.

d. Given that the Brady/Agurs/Bagley line of cases (involving the suppression of favorable evidence) is simply an extension of the Mooney/Pyle/Napue line of cases (involving the use of false evidence), there is no more reason to require prosecutorial willfulness in the latter than in the former. Hence, even a non-knowing use of false evidence will violate due process if there is a "reasonable probability" that the outcome of the trial would have been different without that evidence. In this context, a "reasonable probability" is a

probability "sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. at 682.

B. Application of Due Process Standards to Admission of Exhibit 34 and the State's Hair-Comparison Evidence.

The applicability of the foregoing due process standards to the evidence in this case is straightforward and clear:

1. Fundamental fairness

Although Exhibit 34 and the State's hair-comparison evidence had no actual probative value, the State presented that evidence as persuasive "scientific" evidence of Mr. Blazak's guilt. Obviously, the prejudicial effect of this evidence far outweighed its (non-existent) probative value. Moreover, as the District Court itself found, the evidence was a "crucial" factor in the outcome of the case. The admission of the State's "hair evidence" therefore was fundamentally unfair, and the District Court's unexplained finding to the contrary is completely unsupported by the record.

This conclusion is amply supported by the holdings in the cases cited in Division III(B)(1), supra. For example, in Dudley v. Duckworth, supra, the court reversed the defendant's armed robbery conviction because the prosecution had elicited testimony from a witness (and former co-defendant) that he was nervous about testifying because of a threatening telephone call he had received from an unknown party; the court found that the probative value of this evidence was far outweighed by its prejudicial effect, and that its admission was a denial

of fundamental fairness. 854 F.2d at 972. And in Bisaccia v. Attorney General of New Jersey, supra, the court reversed a conspiracy conviction on the ground that the admission of an alleged co-conspirator's guilty plea was fundamentally unfair. 623 F.2d at 312-13. In Dudley and in Bisaccia, the challenged evidence was both more probative and less prejudicial than the State's "hair evidence" in this case.

2. Presentation of false evidence

The State's presentation of totally non-probative evidence as persuasive proof of Mr. Blazak's guilt amounted to the presentation of false evidence. Since that evidence was "crucial" to the State's case, it is plain that there is a "reasonable probability" that the outcome of the trial would have been different without that evidence. Consequently, the admission of the evidence violated due process under the precedents discussed in Division III(A)(2), pp. 44-45 supra.

IV. NEWLY DISCOVERED EVIDENCE REQUIRES THE REVERSAL OF PETITIONER'S CONVICTIONS AS A MATTER OF DUE PROCESS (CLAIM 5)

As the District Court recognized (ER-13 at 47), newly discovered evidence may form the basis for habeas corpus relief when such evidence probably would have created a reasonable doubt, and hence an acquittal, if it had been presented at trial. Quigg v. Crist, 616 F.2d 1107, 1112 (9th Cir.) cert. denied, 449 U.S. 922 (1980); Harris v. Vasquez, 943 F.2d 930, 956 (9th Cir. 1990); Cornell v. Nix, 953 F.2d

1103 (8th Cir. 1992). In this case, newly discovered evidence concerning (a) a ski mask marked as Exhibit MX, and (b) law enforcement "tampering" with hair samples purportedly taken from another ski mask, State's Exhibit 34, probably would have created a reasonable doubt if presented at Mr. Blazak's 1974 trial.[22]

A. Newly Discovered Evidence Regarding Exhibit MX Would Have Created a Reasonable Doubt if Presented at Trial.

In 1977, almost three years after Mr. Blazak's trial, an attorney then representing Mr. Blazak in state post-conviction proceedings dug in the front yard of the house that Kenneth Pease had occupied at the time of the Brown Fox Tavern incident -- and uncovered a ski mask. (Ex. LX, ER-15 at 19-20). This ski mask, which is solid blue with hand-cut eye holes, was introduced in the state court and the District Court as Exhibit MX. The evidence relating to Exhibit MX plainly would have created a reasonable doubt if it had been presented at Mr. Blazak's trial, for several reasons:

1. The fact that the only two Brown Fox Tavern witnesses who have seen Exhibit MX (Pease and Short) have testified, consistently with the descriptions they gave at the 1974 trial, that it looked like the gunman's mask (Division I(G)(1)(d), pp. 29-32, supra) supports the testimony of all four eye witnesses that Exhibit 34 was not the gunman's mask.

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[22] The newly-discovered-evidence claims were adjudicated by the state courts in post-conviction proceedings. (ER-12 at 21-24, 41-43, 57, 84-85, 104, 106).

This further destroys the probative value of Exhibit 34 and the State's related "hair evidence" -- evidence which the District Court found to be indisputably "crucial to the state's case." (ER-13 at 45). By itself, this factor requires the granting of relief under Claim 5.

2. Taken together with certain scientific evidence, Pease's and Short's testimony regarding Exhibit MX also affirmatively indicated that someone besides Mr. Blazak was the gunman. When Exhibit MX was unearthed in 1978, it was sent to the Institute of Forensic Sciences, where a forensics expert, Charles V. Morton, retrieved five human hairs from the mask. Mr. Morton compared these hairs with known samples of Mr. Blazak's hair and concluded that they did not match. (T. 1/18/79, ER-10 at 117-122; Ex. 4, ER-15 at 115-18).

3. Exhibit MX also tends to exculpate Mr. Blazak by supporting the theory that the gunman was a specific alternative suspect -- Michael Blagg. Mr. Morton's report on his examination of the hairs from Exhibit MX indicates that they were "much darker" in color than Mr. Blazak's hair (Ex. 4, ER-15 at 118); and at the District Court evidentiary hearing, Victoria Gebel, who was married to Michael Blagg in December 1973, testified that Mr. Blagg's hair was dark brown at that time. (T. 7/30/91, ER-14 at 35-36). Of course, this similarity in hair color alone would not point very strongly to Mr. Blagg. However, it becomes significant in combination with other pieces of evidence:

a. Pease testified that he was with Blagg on the evening preceding the Brown Fox Tavern shootings. (T. 11/14/74, ER-2 at 160-65, 168).

b. When Pease appeared before the Grand Jury in July 1974, he testified that he was in the Brown Fox Tavern at the time of the shootings. The following exchange then occurred:

Q. Who else was there with you?

A. Mitch.

Q. Who is Mitch?

A. Mitch is the guy that did the killing.

Q. Do you know what his last name is?

A. Blag or something like that.

Q. Blazak?

A. Blazak, I mean.

(T. 7/15/74, ER-1 at 4; emphasis added). It is difficult to try to explain Pease's initial "Blag" response on the theory that he was unfamiliar with either Mr. Blazak or Mr. Blagg. Pease testified at the 1974 trial that he had "run around" with Mr. Blazak "quite a bit" during the month of December 1973, and that he and Mr. Blazak had visited each other's houses (T. 11/14/74, ER-2 at 159-60); and Mr. Blagg was an employee of Pease's who rode home with him with some frequency (id. at 159; T. 7/30/91, ER-14 at 36). The most logical explanation for Pease's initial use of the name "Blag" to identify the gunman would seem to be that he "slipped up" and told the truth.

c. The Michael Blagg theory also has support in Pease's June 3, 1991, deposition. At that time, Pease conceded that he could not remember the name "Blazak" when he was contacted by Mr. Blazak's habeas counsel prior to the deposition. Moreover, when he was asked for his then existing recollection of the name of the gunman, he indicated that the first name was "Michael" -- and he later indicated that the letters 'MB' on a diagram he had made of the Brown Fox Tavern referred to Mike Blazak. (Ex. 1, ER-15 at 58, 66).[23]

4. Quite apart from the Michael Blagg theory, Exhibit MX also could have been used by the defense to point to another pair of alternative suspects, Francis Barrett and Alfred McGeorge:

a. At approximately 12:45-1:00 a.m. on December 15, 1973, while responding to a call regarding the Brown Fox Tavern homicides, two Tucson Police Officers saw Barrett and McGeorge emerging from an alley near the Tavern. (Ex. 12, ER-15 at 128). Barrett was described as 6'2"-6'3" tall and 180-200 lb., which was consistent with the eye witnesses' description of the Brown Fox Tavern gunman. (Id.)

b. Although a single unidentified witness indicated that Barrett and McGeorge were not the perpetrators (id.), the police took them into custody and gave them polygraph

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[23] Even after counsel for Respondents had referred to the gunman as "Mitchell" eleven times during the deposition (Ex. 1, ER-15 at 81-87), Pease could not decide between "Mitchell" and "Michael." (id. at 88).

examinations concerning their involvement in the Brown Fox Tavern homicides. (Id. at 129-30). McGeorge "passed" his test, but the Barrett results were inconclusive. (Id.)

c. On March 22, 1974, Tucson Police Detective Hust took a statement from a Pima County Jail inmate named Van Noy. Mr. Van Noy stated that while he and McGeorge were in the Jail together, McGeorge had told him that McGeorge and Barrett were guilty of the crimes at the Brown Fox Tavern, and that Barrett was the gunman. (Id. at 131-132). Mr. Van Noy subsequently "passed" a polygraph test concerning these allegations. (Id. at 133).

d. From the Tucson Police Department records it appears that the only reason Barrett and McGeorge were "cleared" was that their hair samples did not match those retrieved from Exhibits 34 and A (the two identical ski masks that had been found shortly after the Brown Fox Tavern incident). (Id. at 134). However, since Exhibit 34 was not the gunman's mask (but Exhibit MX probably was), the fact that Barrett's and McGeorge's hairs did not match the hairs from Exhibit 34 did not exculpate them, and the evidence regarding them would have created an additional reasonable doubt as to Mr. Blazak's guilt.

5. Especially given the extreme weakness of the State's case against Mr. Blazak, the points made above make it clear that it is more than probable that the newly discovered evidence concerning Exhibit MX would have created a reasonable

doubt, and hence an acquittal. Certainly this is a more compelling case than Cornell v. Nix, 953 F.2d 1103 (8th Cir. 1992), in which the court reversed a first-degree murder solely on the basis of a prosecution witness's post-trial recantation of testimony that the defendant had said that he had broken the victim's neck.[24]

B. Newly Discovered Evidence Concerning Evidence "Tampering" Also Would Probably Have Produced An Acquittal.

The record in this case also contains substantial newly discovered evidence indicating that Pima County Sheriff's Detectives Weaver Barkman and Michael Tucker -- or someone else -- "tampered" with the hair sample that Captain Kempe obtained from State's Exhibit 34 before it was sent to the FBI. While that evidence is unnecessary to a decision in this case in light of the other matters already covered in this Brief, for the sake of completeness the following paragraphs will show that even without Exhibit MX, the "tampering" evidence alone would have created a reasonable doubt that did not otherwise exist.

1. A strong initial indication that someone "tampered" with the hairs from Exhibit 34 lies in the physical discrepancies between the Kempe and Clark hairs. (See Division I(G)(2)(a), pp. 33-36, supra). Certainly it was

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[24] This case also is plainly distinguishable from Quigg v. Crist, supra, in which this court rejected a newly-discovered-evidence claim on the grounds that the new evidence did not contradict strong circumstantial evidence of the defendant's guilt. 616 F.2d at 1112.

possible that these discrepancies could have resulted from something other than purposeful tampering; but at the same time, tampering was the most likely explanation for such discrepancies. In addition:

a. In 1977, former constable Byron Stuckey testified that Michael Tucker had admitted that he and Weaver Barkman had planted hair in a homicide-case property bag that was sent to the FBI. (T. 6/16/77 [a.m.], ER-8 at 13-19, 31-32) Stuckey earlier had passed a polygraph test regarding this accusation. (Id. at 25-28). Independently, a private investigator named Patricia Ashburn testified that Tucker had admitted to planting evidence in a marijuana investigation, and that when she mentioned this to members of an investigative firm in which Tucker then was a partner, one of them told her that Tucker earlier had boasted of planting evidence in Mr. Blazak's case. (T. 2/8/79, ER-11 at 45-46).

b. At various times, several law enforcement officers, including Barkman, Tucker, Kempe, and Hust, had access to the "known" and "unknown" hair samples from the Brown Fox Tavern case. (Exhibits 1X and BX, ER-15 at 1, 12-13; T. 6/21/77, ER-9 at 30-32, 60, 63-64, 71-72; T. 1/17/79, ER-10 at 73, 78; Prehearing Memorandum of July 28, 1978, ER-12 at 37). Moreover, during an interrogation of Mr. Blazak shortly after his arrest on July 12, 1974, Barkman told Mr. Blazak that they were going to get him with "just one little piece of hair."

(Ex. 14, ER-16 at 181-82).[25]

2. If the jury had heard the "tampering" evidence, their evaluation of the probative value of the State's "hair evidence" probably would have been affected sufficiently to create a reasonable doubt as to Mr. Blazak's guilt. This conclusion is not altered by 28 U.S.C. § 2254(d)'s presumption of correctness for state court factual findings. It is true that the state court found as a fact that no one "tampered" with the hairs from Exhibit 34. (T. 6/21/77, ER-9 at 169-70). However, this finding simply does not address the critical question that governs the newly-discovered-evidence claim -- which is whether the newly discovered evidence probably would have created a reasonable doubt as to guilt, not whether that evidence establishes "tampering" by a preponderance of the evidence.[26] Consequently, the state court's "tampering" findings, even if presumed correct, do not dispose of the newly discovered evidence claim based on the evidence of "tampering."

C. The Combined Effect of Exhibit MX and the "Tampering" Evidence.

The preceding sub-divisions have shown that either

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[25] Both Tucker and Barkman denied having tampered with the hair samples in the Brown Fox Tavern case. (T. 6/16/77 [p.m.], ER-8 at 99; T. 6/21/77, ER-9 at 34-35). Given their obvious motive to hide any wrongdoing on their parts, however, this was hardly surprising.

[26] To put the point somewhat differently: Evidence that is not sufficient to show "tampering" by a preponderance of the evidence nevertheless may be more than sufficient to create a reasonable doubt.

Exhibit MX or the "tampering" evidence would have been sufficient by itself to probably produce an acquittal. A fortiori, the combined effect of these two strands of newly discovered evidence more than meets the Quigg v Crist test, and requires reversal under Claim 5.

D. Exhibit MX Was "Newly Discovered".

Whether evidence is "newly discovered" properly must turn on whether it was effectively available to the defense at the time of trial. See Harris v. Vasquez, 943 F.2d 930, 957 (9th Cir. 1990) (holding evidence of organic brain damage not "newly discovered" because such evidence was available to defendant's counsel and defense psychiatrists at time of trial). Even though Mr. Blazak knew of the existence of Exhibit MX at the time of his trial, that knowledge obviously was of no use to him unless he could effectively communicate it to his attorney -- who was the only person who was in a position to actually obtain Exhibit MX and develop the related testimony and scientific evidence discussed in Division IV(A), supra.

The District Court itself recognized the very point made above when it stated that "[i]f Petitioner was unable to effectively communicate [his knowledge concerning Exhibit MX] to his attorney, then the evidence could be considered newly-discovered." However, the District Court then reasoned as follows:

> Petitioner did not prove at the evidentiary hearing that he was actually incompetent [to stand trial in 1974].

> Without proving that Petitioner was incompetent, this Court cannot say that the buried ski mask was "newly-discovered."

(ER-13 at 60-61).

This holding that Exhibit MX was not "newly discovered" improperly confused the issue of whether that Exhibit was available to the defense at the time of trial with the issue of whether Mr. Blazak was incompetent to stand trial, and it was contrary to the evidence in the record:

1. Mr. Blazak's incompetency to stand trial certainly would have been relevant to his ability to communicate with counsel. At the same time, however, it was possible that Mr. Blazak could be legally competent to stand trial but still have insuperable difficulties in communicating with his attorney with regard to Exhibit MX.

2. In fact, the record clearly demonstrates that Mr. Blazak did repeatedly attempt to tell his attorney, Mr. Kashman, about the blue ski mask (Exhibit MX) buried in Kenneth Pease's front yard -- and to get Mr. Kashman to pursue that evidence -- but that these attempts were unsuccessful:

a. During the 1974 trial, Mr. Blazak did tell Mr. Kashman about the buried ski mask, but Mr. Kashman misunderstood this information. As the District Court found:

> Kashman thought that Blazak was referring to an orange ski mask. Blazak, however, was concerned with a buried blue ski mask. Kashman did not realize until the trial was over that the buried mask was blue.

(ER-13 at 57; see also T. 1/18/79, ER-10 at 89-96, 104-107; T. 2/8/79, ER-11 at 74-77).

b. The lack of effective communication between Mr. Blazak and Mr. Kashman with regard to the buried ski mask was confirmed not only by their testimony, but also by the expert testimony of Dr. Joseph Geffen. At the District Court hearing, Dr. Geffen testified (a) that there was a reasonable basis to believe that at the time of the 1974 trial, Mr. Blazak was suffering from a mental disorder that made it difficult for him to effectively communicate with his attorney, and (b) that the state court record concerning the interaction between Mr. Blazak and Mr. Kashman regarding the buried ski mask illustrated "the kind of difficulty that existed in communicating between [them] . . . ." (T. 7/31/91, ER-14 at 82, 84-94). Mr. Kashman's own testimony in the District Court confirmed that he did experience unusual difficulties in communicating with Mr. Blazak, both with regard to a list of supposed witnesses and with regard to the buried ski mask. (Id. at 152-155, 161-163, 168).

c. In sum, Exhibit MX was not effectively available to the defense during the 1974 trial because Mr. Blazak's efforts to get his attorney to obtain and present that evidence were unavailing. Regardless of whether Mr. Blazak was legally incompetent to stand trial, Exhibit MX therefore was "newly discovered."

3. Mr. Kashman's misunderstanding with regard to the color of the buried ski mask was crucial because Pease testified that his ski mask was orange, but that the gunman's

mask was solid blue.[27] Obviously, Pease's mask was of no potential evidentiary value to the defense. However, as Division IV(A), supra, already has demonstrated, the gunman's mask had great potential (and actual) probative value.

4. The preceding paragraphs demonstrate that the District Court erred in finding that Exhibit MX was not "newly discovered," and that this Court should reverse that finding and direct the District Court to enter judgment on Claim 5. However, even if one assumed (albeit incorrectly) that Petitioner was required to show that he was incompetent to stand trial in order for Exhibit MX to be considered newly discovered, this Court should reverse the District Court and remand for further proceedings on the competency sub-issue. This is because the District Court's pre-evidentiary hearing orders led Petitioner's counsel into reasonably believing that it was not necessary to prove Mr. Blazak's incompetency to stand trial in order to show that Exhibit MX was newly discovered:

a. On January 31, 1991, the District Court granted Petitioner's motion for reconsideration regarding Claim 5. (ER-13 at 58). That order noted that there was a relationship between Petitioner's competency to stand trial and that the fact that Petitioner "was unable to communicate to defense

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[27] In the District Court evidentiary hearing, Mr. Kashman confirmed that he thought Mr. Blazak was referring to the ski mask "that was used by Mr. Pease during the course of the Brown Fox." (T. 7/31/91, ER-14 at 153; emphasis added).

counsel that the buried ski mask was blue, and not orange . . . ." (ER-13 at 57). However, the District Court then reiterated that "[i]n any event, . . . because petitioner did not effectively communicate the evidence of the blue ski mask to defense counsel, this evidence may be considered 'newly discovered.'" (Id.; emphasis added).

b. As the preceding paragraph demonstrates, the District Court's Order of January 31, 1991, indicated to the parties that whether Exhibit MX was newly discovered turned on the specific issue of whether Mr. Blazak had effectively communicated the existence of a buried blue ski mask to Mr. Kashman -- not on the more general issue of whether Mr. Blazak was incompetent to stand trial. Petitioner's habeas counsel therefore had no reason to believe that they would have to prove Mr. Blazak was incompetent to stand trial in order to prevail on Claim 5.[28] Nor was there any reason to believe that Mr. Blazak had to prove actual incompetency with regard to any other claim. (Even Claim 11, which alleged that the state trial court's failure to hold a competency hearing in 1974 violated due process, only required Petitioner to show that there was a reasonable basis to believe that Mr. Blazak was incompetent at that time.)

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[28] In fact, it simply would not have made sense to make a "newly discovered" finding dependent on an incompetency finding: If Mr. Blazak was found to be incompetent to stand trial in 1974, his conviction would have to be reversed in any event, and the newly-discovered-evidence issue necessarily would become moot.

c. As noted previously, incompetence to stand trial is not a sine qua non for a newly-discovered-evidence claim. But if this Court were to decide otherwise, it should remand to the District Court to permit Petitioner a reasonable opportunity to introduce evidence specifically on that issue.[29]

E. The "Tampering" Evidence Also Was "Newly Discovered".

A further flaw in the District Court's decision regarding Claim 5 is that it completely ignores the "tampering" evidence discussed in Division IV(B), supra. (See Order of September 10, 1991, ER-13 at 60-61). That evidence first came to light some years after Mr. Blazak's trial, when Pima County Sheriff's Deputy Michael Tucker told Byron Stuckey and members of a private investigation firm that he had planted evidence in the Brown Fox Tavern case. (See Division IV(B), supra). That evidence obviously was not available to the defense in 1974, and hence it is "newly discovered." And as Division IV(B), supra, already has shown, the "tampering" evidence

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[29] Petitioner's counsel believe it appropriate to make it clear that this suggestion is not made on the speculative basis that Petitioner might be able to produce evidence that it was more likely than not that he was incompetent in 1974. At the District Court hearing, Dr. Joseph Geffen testified that there was a reasonable basis to believe that Mr. Blazak was incompetent to stand trial in 1974, but that it was not possible to give an opinion to a reasonable medical probability as to whether Mr. Blazak actually was incompetent. (ER-14 at 82, 94, 97-98). If asked to do so, however, Dr. Geffen would have testified that in his opinion, it was more likely than not (albeit less than reasonably medically certain) that Mr. Blazak was incompetent to stand trial in 1974.

alone would have created a reasonable doubt if it had been presented at the trial.

V. THE STATE'S FAILURE TO DISCLOSE THAT ITS KEY WITNESS, KENNETH PEASE, HAD BEEN RELEASED FROM CUSTODY, IN ANTICIPATION OF THE DISMISSAL OF PENDING CRIMINAL CHARGES AGAINST HIM, VIOLATED PETITIONER'S RIGHT TO DUE PROCESS (CLAIM 6)

As Division I(D)(9) (pp. 18-20, supra) already has shown, the question of whether Kenneth Pease, the prosecution's key witness, testified in anticipation of the dismissal of pending bad-check charges was vigorously disputed at Petitioner's trial. (T. 11/15/74, ER-3 at 31; T. 11/19/74, ER-5 at 100-105, 111, 113). Nevertheless, the prosecution failed to disclose the fact that while the jury in Mitchell Blazak's case was still deliberating, Pease was secretly released from custody and returned to New Mexico (T. 12/20/74, ER-7 at 126, 157-58), apparently in anticipation of the dismissal of the bad-check charges a few days later. (Id. at 123). The prosecution's failure to disclose that Pease had been released from custody unfairly deprived the defense of critically relevant evidence regarding: (1) the contested issue of whether Pease testified in anticipation of freedom from the bad-check charges; and (2) the issue of whether Pease lied when he denied such a deal existed.[30]

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[30] The issues raised in Claim 6 were adjudicated in Mr. Blazak's direct appeal. State v. Blazak, 560 P.2d 54, 60 (Ariz. 1977).

APPENDIX M

Excerpts from Petitioners'
Opening Brief
in the Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NOS. 91-16549 and 91-16562

MITCHELL THOMAS BLAZAK,	)	
	)	
Petitioner-Appellant,	)	ON APPEAL FROM THE
	)	UNITED STATES DISTRICT COURT
-vs-	)	FOR THE DISTRICT OF ARIZONA,
	)	NO. CIV-90-446 TUC RMB
JAMES RICKETTS, et al.,	)	
	)	
Respondents-Appellees.	)	
	)	

RESPONDENTS-APPELLEES' OPENING BRIEF

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The district court's attempt to attribute retroactively discovered evidence to a state trial court 18 years after a state conviction and call it a violation of due process is clearly in violation of the United States Supreme Court's holding in Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989); Penry v. Lynaugh, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989); Butler v. McKellar, 494 U.S. 407, 110 S. Ct. 1212, 108 L. Ed. 2d 347 (1990), Saffle v. Parks, 494 U.S. 484, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990), Collins v. Youngblood, 497 U.S. ___, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990); and Sawyer v. Smith, 497 U.S. ___, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990). That holding must be vacated.

II

THE DUE PROCESS DOCTRINE ESTABLISHED IN PATE V. ROBINSON, 383 U.S. 375, 86 S. CT. 836, 383 L. ED. 2d 815 (1966), IS NOT APPLICABLE HERE BECAUSE THE EVIDENCE RELIED ON BY THE DISTRICT COURT WAS NEVER PRESENTED TO THE STATE TRIAL COURT. IF THERE WAS NO EVIDENCE BEFORE THE STATE TRIAL COURT WHICH MIGHT CALL PETITIONER'S COMPETENCY INTO QUESTION, THERE WAS NO DUE PROCESS RIGHT TO AN EVIDENTIARY HEARING.

The issue presented by the district court's order with respect to claim 11 is one of insufficient factual support; are the district court's findings supported by the facts that were present before the state trial court? This Court reviews the district court findings only to determine "whether a reasonable judge [after evaluating all the

evidence,] . . . should have experienced doubt with respect to [the defendant's] competence to stand trial." Hernandez v. Ylst, 930 F.2d at 716; see also, de Kaplany v. Enomoto, 540 F.2d 975, 983, (en banc), cert. denied, 429 U.S. 1075 (9th Cir. 1976). Respondent submits that there was no evidence before the state trial court that should have raised doubt about petitioner's competence. Therefore, there is no factual support for the district court's conclusion.

The due process clause of the Fourteenth Amendment will not permit the trial of one who lacks sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding or who lacks a rational as well as factual understanding of the proceedings against him. Dusky v. United States, 362 U.S. at 402. Due process also requires an evidentiary hearing to be held if any evidence is before the state trial court that raises a "bona fide" doubt about the defendant's competence to stand trial. Pate v. Robinson, 383 U.S. at 385.

Arizona recognizes this basic tenent and guards against its violation by various rules of procedure:

> A person shall not be tried, convicted, sentenced or punished for a public offense while, as a result of a mental illness or defect, he is unable to understand the proceedings against him or to assist in his own defense.

Rule 11.1, Ariz. R. Crim. P.; State v. Amaya-Ruiz, 166 Ariz. 152, 161, 800 P.2d 1260, 1269 (1990).